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Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

No. 9668

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Appellant,

vs.

ETHEL M. DOHENY, as Administratrix of the Estate of Roberta Doheny, Deceased,

Appellee.

and

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Appellant,

vs.

ETHEL M. DOHENY, as Administratrix of the Estate of Marguerite Doheny, Deceased,

Appellee.

Transcript of Record

Upon Appeals from the District Court of the United States for the District of Montana.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

No. 9668

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UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD:

E. J. McCABE,
Great Falls, Montana.
Attorney for Plaintiffs.

TOOLE & BOONE,
Missoula, Montana.
Attorneys for Defendants. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States in and for the District of Montana.
Great Falls Division.

No. 69.

ETHEL M. DOHENY, as Administratrix of the Estate of Roberta Doheny, Deceased,
Plaintiff,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,
Defendant.

and

No. 70.

ETHEL M. DOHENY, as Administratrix of the Estate of Marguerite Doheny, Deceased,
Plaintiff,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,
Defendant.

Be it remembered that on July 20, 1939, a Transcript on Removal from the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, was duly filed in each of the above entitled causes, said transcripts on removal each consisting of the following papers, towit:

Complaint,
Petition for Removal,

Notice of Petition and Bond for Removal,
Bond on Removal,
Order for removal,
Clerk's Certifiate to Transcript on Removal,

and being in the words and figures following, towit:

[2]

In the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade

ETHEL M. DOHENY, as Administratrix of the Estate of Roberta Doheny, Deceased,

Plaintiff,

v.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation,

Defendant.

COMPLAINT

The plaintiff for her cause of action against the defendant complains and alleges:

I.

The plaintiff is informed and believes and therefore alleges that at all times hereinafter mentioned the defendant, United States Fidelity and Guaranty Company, was and still is a corporation created, organized and existing under and by virtue of the laws of the State of Maryland and authorized to do and doing business within the State of Montana.

II.

That on or about the 8th day of April, 1935, plaintiff was, by an order of the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clerk, appointed Administratrix of the Estate of Roberta Doheny, Deceased, by an order of said court, duly given, made and entered on said date in the matter of the Estate of Roberta Doheny, Deceased, and thereafter letters of administration in the Estate of Roberta Doheny, Deceased, were duly issued to plaintiff under the seal of said court and the hand of the Clerk of said court and that at all times since plaintiff has been and still is the duly appointed, qualified and acting administratrix of the Estate of Roberta Doheny, Deceased. [3]

III.

That on or about the 20th day of September, 1934, John M. Coverdale and E. O. Johnson, as co-partners, doing business under the firm name of Coverdale & Johnson, made and entered into a certain written agreement with the State of Montana for the performance by said co-partners of certain work and furnishing certain materials constituting improvements on a public highway known as the "Augusta-Sun River Road" in Lewis and Clark County, Montana, wherein and whereby the said co-partners promised and agreed to perform the work and furnish the materials in accordance with the terms of said contract in consideration of the payment to said co-partners by the State of

Montana of the sum of approximately Fifteen Thousand, Six Hundred Fifteen and Sixty-six Hundredths Dollars ($15,615.66) in accordance with the terms of said agreement. That under the terms of said agreement the said co-partners promised and agreed to furnish a good and sufficient surety bond in the amount of $15,615.66 to be conditioned for the faithful performance of the covenants and agreements set forth in said agreement and to be by said co-partners performed and thereafter pursuant thereto the said co-partners, as Principal, and said United States Fidelity and Guaranty Company, as Surety, made, entered into and delivered to the State of Montana a certain agreement designated "Contract Bond" which said agreement was conditioned for the faithful performance in all respects of the provisions of said contract by the said co-partners and recited the sum of $15,615.66 as the penalty thereof.

IV.

That under the terms and provisions of Paragraph 7.11 of section 7 of said written agreement between the aforesaid co-partners and the State of Montana for the performance of work and furnishing of materials described therein, the said co-partners promised and agreed to carry public liability insurance to indemnify the public for injuries or damages sustained by reason of the carrying on the work in the amount of at least $10,000.00 for one person and a [4] total of $20,000.00

for one accident and promised to submit adequate evidence to the State Highway Commission of the State of Montana of taking out such public liability insurance and thereafter as evidence of taking out of said public liability insurance the defendant United States Fidelity and Guaranty Company notified the Montana Highway Commission in writing on or about October 1st, 1934, that said defendant corporation had issued contractors' public liability insurance policy for said co-partners under said contract with a liability of $10,000.00 for one person and $20,000.00 for one accident. That plaintiff has heretofore demanded the original or a copy of said public liability insurance policy from the said co-partners and from the defendant, United States Fidelity and Guaranty Company, and said co-partners and said defendant have failed and refused to furnish either thereof and that plaintiff is informed and believes and therefore alleges that under the provisions of said insurance policy and in accordance with the provisions of the agreement between the said co-partners and the State of Montana the defendant corporation promised and agreed to pay all claims from liability imposed upon the aforesaid co-partners by law for damages on account of bodily injuries including death at any time resulting therefrom sustained by any of the public by reason of the carrying on of the work mentioned and described in the contract between said co-partners and the State of Montana in connection with the public Highway mentioned in said contract, and

expressly provided in said policy that any person of the public sustaining injuries and damages as aforesaid or his or her personal representative was authorized to institue and maintain an action against the defendant corporation for the amount of any judgment obtained in an action theretofore brought against the said co-partners for such damages and injuries in case execution on said judgment against the said co-partners be returned unsatisfied.

V.

That thereafter and on or about the 12th day of December, 1934, and while carrying on the work mentioned and described in the [5] written agreement between the co-partners and the State of Montana the aforesaid co-partners operated a certain automobile in such a grossly negligent and reckless manner as to injure and kill one Roberta Doheny and that at the time the said Roberta Doheny was a member of the public and said automobile was then and there being used in carrying on the work under aforesaid agreement and that thereafter in an action instituted in the District Court of the Eighth Judicial District in the State of Montana in and for the County of Cascade by the above named plaintiff and against the aforesaid co-partners to recover for the injuries and damages sustained by said Roberta Doheny and her resulting death as the proximate result of the reckless and grossly negligent operation of said automobile as aforesaid, a judgment in the sum of $5,116.89 was

duly given, made and entered by said Court in favor of the said plaintiff and against the said co-partners on the 4th day of May, 1936, and that neither said judgment nor any part thereof has been paid by said co-partners or by the defendant, United States Fidelity and Guaranty Company, although demand of payment thereof has heretofore been made by plaintiff.

VI.

That thereafter the said co-partners appealed to the Supreme Court of the State of Montana from said judgment and thereafter on the 20th day of May, 1937, the judgment of the aforesaid District Court was affirmed and sustained by the Supreme Court of the State of Montana and remittitur on said judgment was issued by the Supreme Court to the aforesaid District Court and thereafter filed in said District Court on the 5th day of June, 1937. That neither said judgment nor any part thereof nor the interest thereon has been paid and that plaintiff still is the owner and holder of said judgment.

VII.

That thereafter on or about the 17th day of August, 1937, an execution was issued and placed in the hands of the Sheriff of Deer Lodge County, State of Montana, the place of residence and principal place of business of the aforesaid co-partners, requiring [6] the Sheriff to satisfy aforesaid judgment out of the property of said co-partners and that said execution was returned to the District

Court of Cascade County, on or about the 10th day of September, 1937, unsatisfied and bearing the certificate of the Sheriff that he returned said execution wholly unsatisfied because no personal or real property of said co-partners could be found.

VIII.

That the said co-partners had fully complied with all the requirements and conditions precedent enumerated in the aforesaid policy and that plaintiff has complied with all the requirements and conditions precedent and is entitled to maintain this action against the defendant, United States Fidelity and Guaranty Company, to recover the sum of $5,116.89 and accrued and accruing interest thereon from May 4, 1936, and became so entitled to maintain said action on or about the 10th day of September, 1937, upon the return of the execution not satisfied and by virtue of the judgment rendered and against the said co-partners and finally determined by the aforesaid Supreme Court on appeal on or about the 5th day of June, 1937.

IX.

That plaintiff is informed and believes and therefore alleges that the defendant, United States Fidelity and Guaranty Company retained attorneys and paid the said attorneys for their services in conducting the defense by the co-partners of the action instituted in the District Court aforesaid and that said defendant retained the attorneys and paid for their services rendered and paid the expenses

connected with the appeal of the aforesaid action to the Supreme Court of the State of Montana from the judgment given, made and entered by the aforesaid District Court in said action.

X.

That heretofore on or about May 13th, 1938, the said plaintiff demanded payment of the aforesaid judgment from the defendant, a true and correct copy of which written demand so made upon the said defendant is hereto annexed marked "Exhibit A" and by this reference [7] made a part hereof. That said defendant has failed to make payment of said judgment either in whole or in part.

Wherefore, Plaintiff prays judgment against the defendant for the sum of $5,116.89 and interest thereon at the rate of Six Per Cent (6%) per annum from May 4, 1936, and costs of this action and for such other and further relief as may be equitable, just and proper.

E. J. McCABE,
Attorney for Plaintiff

State of Montana
County of Cascade—ss.

E. J. McCabe being first duly sworn deposes and says:

That he is the attorney for plaintiff named in the foregoing complaint, and makes this verification for the reason that plaintiff is absent from Cascade County, Montana, wherein affiant resides and maintains his office and where this verification is made;

That affiant has read the foregoing complaint, knows the contents thereof and that same is true to the best knowledge, information and belief of this affiant.

E. J. McCABE

Subscribed and sworn to before me this 24th day of April, 1939.

(Notarial Seal) KATHLEEN SMESTAD
Notary Public for the State of Montana. Residing at Great Falls, Montana

My commission expires Mar. 31, 1942. [8]

"EXHIBIT A"

Great Falls, Montana
May 13, 1938

United States Fidelity and Guaranty Company
Baltimore, Maryland
Gentlemen:

On or about the 20th day of September, 1934, John M. Coverdale and E. O. Johnson, co-partners doing business under the name of Coverdale and Johnson, entered into a written contract with the State Highway Commission of the State of Montana for the performance of certain work and the furnishing of certain materials constituting improvements on a public highway known as the "Augusta-Sun River Road" in Lewis and Clark County, Montana. At the time of the making of said contract the said John M. Coverdale and E. O. Johnson, co-partners as aforesaid, as Principal and your Company as Surety executed and delivered a

certain contract bond in writing in the principal sum of $15,615.66, the condition of which bond was that the aforesaid co-partners would in all respects faithfully perform all of the provisions of the aforesaid contract between said co-partners and the State of Montana acting by and through the State Highway Commission.

The aforesaid Highway Contract contained the following provision:

> "The Contractor shall carry public liability insurance to indemnify the public for injuries or damages sustained by reason of the carrying on the work. This insurance shall be in the amount of at least $10,000.00 for one person and a total of $20,000.00 for one accident. The Contractor shall submit adequate evidence to the Commission that he has taken out this insurance."

Thereafter your Company notified the State Highway Commission of Montana by written communication that you had written a public liability policy of insurance in accordance with the terms and provisions of aforesaid contract to and with the aforesaid co-partners in the amount of $10,000.00 for one person and a total of $20,000.00 for one accident. Thereafter, one Roberta Doheny was killed as a result of the grossly negligent and reckless operation of an instrumentality being used by said co-partners at the time in carrying on the prosecution of the work under aforesaid Highway con-

tract. An action was thereafter instituted in the District Court of the 8th Judicial District of the State of Montana in and for the County of Cascade by the undersigned, Ethel M. Doheny, as Administratrix of the estate of Roberta Doheny, deceased, to recover from said co-partners damages by reason of the injuries and death of aforesaid Roberta Doheny by reason of the alleged grossly negligent and reckless operation of aforesaid instrumentality while carrying on the prosecution of work under the aforesaid Highway contract, in which action a judgment was duly given, made and entered by said Court on the verdict on the 4th day of May, 1936, of the jury empanelled to try said action against the said co-partners, as defendants, for the sum of $5000.00 together with the additional sum of $116.89 costs together with interest thereon at the rate of 6% per annum, and which action was defended at your direction by Attorneys employed by your Company and to whom you paid an Attorney's fee for their services rendered in said action.

[9]

An appeal was taken to the Supreme Court of Montana from the judgment in said action by aforesaid Attorneys at your suggestion and the services of said Attorneys rendered on said appeal were paid by your Company. Thereafter, the judgment of the lower Court was duly affirmed by the Supreme Court. Said judgment has not been paid nor any part thereof and the undersigned as Administratrix

aforesaid still is the owner and holder of said judgment.

At the direction of the undersigned, E. J. McCabe, her Attorney, made oral demand for payment of the aforesaid Judgment upon Don Jacobus, your agent at Helena, Montana, and was informed by said agent that your Company claimed non-liability for payment of said judgment and refused payment thereof.

An execution on aforesaid judgment has been heretofore duly issued and delivered to the Sheriff for levy and enforcement of said judgment against property of aforesaid co-partners and the said execution has been returned unsatisfied either in part or in whole by reason of inability to locate any property of aforesaid co-partners.

At the direction of the undersigned, her aforesaid Attorney has conducted an investigation for the purpose of finding any property of aforesaid co-partners available for execution and no property of any kind has been located.

Demand is hereby made that you pay the undersigned, as Administratrix, aforesaid, the aforesaid judgment in the sum of $5,116.89 with interest from May 4th, 1936 at the rate of 6% per annum, and in the event of your failure to comply with this demand, notice is hereby given that the undersigned will institute suit to enforce payment of said judgment.

A copy of the within demand is being delivered to your agent at Helena, Montana.

Very truly yours,
ETHEL M. DOHENY,
414 Strain Building
Great Falls, Montana

[Endorsed]: Filed July 20, 1939. C. R. Garlow, Clerk. [10]

In the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade.

ETHEL M. DOHENY, as Administratrix of the Estate of Roberta Doheny, Deceased,

Plaintiff,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Defendant.

PETITION FOR REMOVAL

Comes now United States Fidelity and Guaranty Company, a corporation, the defendant named in the above entitled action and makes and presents this its petition for removal of the above entitled action to the District Court of the United States for the District of Montana, and respectfully shows and alleges:

I.

That the above entitled action is an action in which there is a controversy which is wholly between citizens of different states. That the plaintiff in said action was, at the occurrences relied upon in the complaint, and at the time of the commencement of this action, and still is a resident and citizen of the State of Montana.

II.

That the defendant, United States Fidelity and Guaranty Company is now, and at all of the times mentioned in plaintiff's complaint has been, and was at the time of the commencement of the above entitled action, a corporation duly [11] organized and existing under and by virtue of the laws of the State of Maryland, licensed to do business in Montana, and a citizen and resident of the State of Maryland, and a non-resident of the State of Montana.

III.

That on or about the 2nd day of June, 1939, the plaintiff herein filed the above entitled action against the above named defendant in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, said action being Cause No. 28770 in said court and district. That in the above entitled action the plaintiff seeks to recover from the defendant United States Fidelity and Guaranty Company, a corporation, the sum of Five Thousand One Hundred six-

teen and 89/100 Dollars ($5116.89) which amount allegedly represents the amount of a certain judgment given, made and entered by the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, in favor of the above named plaintiff in an action by the above named plaintiff against John M. Coverdale and E. O. Johnson, as co-partners, doing business under the firm name of Coverdale & Johnson.

That in the above entitled action the plaintiff seeks to recover the amount of said judgment, to-wit, the sum of Five Thousand One Hundred sixteen and 89/100 Dollars ($5116.89), together with interest, from the defendant United States Fidelity and Guaranty Company on the ground that said defendant had issued to the said John M. Coverdale and E. O. Johnson as said co-partners, doing business under the firm name of Coverdale & Johnson, a contractors' public liability insurance policy with a liability of $10,000.00 for one [12] person and a total of $20,000.00 for one accident and plaintiff further alleges that by reason of the issuance of said policy of insurance the said defendant United States Fidelity and Guaranty Company is legally bound and obligated to pay the said judgment in the amount of Five Thousand One Hundred sixteen and 89/100 Dollars ($5116.89), together with interest from and after May 4, 1936.

That the matter and amount in dispute and controversy in said suit exceeds, exclusive of interest and costs, a sum or value of Three Thousand and

no/100 Dollars ($3000.00), all of which will more fully appear from the complaint in said action, which is hereby referred to and made a part hereof.

IV.

That the defendant makes and files herewith a bond in the sum of Three Hundred and no/100 Dollars ($300.00), with good and sufficient surety for their entering in the District Court of the United States for the District of Montana, within thirty days from the date of filing this petition a cerified copy of the record in this suit and for paying all costs that may be awarded by said District Court of the United States, if it shall hold that this suit was wrongfully and improperly removed thereto.

Wherefore, this petitioner prays this court to proceed no further herein except to accept this petition and said bond and to make an order requiring said defendant to enter and file a certified copy of the record herein in the said District Court of the United States for the District of [13] Montana, within thirty days from the filing of this petition, as provided by law.

HOWARD TOOLE
W. T. BOONE
Attorneys for Defendant. [14]

State of Montana
County of Lewis and Clark—ss.

Don W. Jacobus, being first duly sworn upon his oath, deposes and says: That he is the Manager for the defendant, United States Fidelity and Guaranty

Company, a corporation, and that he makes this verification as such manager for and on behalf of said defendant and that he is duly authorized to make the same; that he has read the foregoing petition and knows the contents thereof and that the matters and things therein stated are true.

DON W. JACOBUS

Subscribed and sworn to before me this 19th day of June, 1939.

(Seal) W. T. BOONE

Notary Public for the State of Montana. Residing at Missoula, Montana.

My commission expires Aug. 2, 1941.

[Endorsed]: Filed July 20, 1939. C. R. Garlow, Clerk. [15]

In the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade.

ETHEL M. DOHENY, as Administratrix of the Estate of Roberta Doheny, Deceased,

Plaintiff,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Defendant.

NOTICE OF PETITION AND BOND FOR REMOVAL

To Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, the above named plaintiff:

To E. J. McCabe, plaintiff's attorney:

You and each of you are hereby notified that United States Fidelity and Guaranty Company, a corporation, the defendant in the above entitled action, will on the 27th day of June, 1939, file in said action in said Court, the petition and bond of said defendant, copies of which are hereto attached and served upon you, for removal of said cause to the District Court of the United for the District of Montana, Great Falls Division, and will on said date at the hour of 10 o'clock A. M., or as soon thereafter as counsel can be heard, present said petition and bond so filed in the above entitled Court, and move said Court for an order removing said

cause to the District Court of the United States, for the District of Montana, in accordance with said Petition and Bond.

Dated this 19th day of June, 1939.

HOWARD TOOLE
W. T. BOONE
Attorneys for Defendant.

[Endorsed]: Filed July 20, 1939. C. R. Garlow, Clerk. [16]

In the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade.

ETHEL M. DOHENY, as Administratrix of the Estate of Roberta Doheny, Deceased,
Plaintiff,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,
Defendant.

BOND ON REMOVAL

Know All Men By These Presents, That we, United States Fidelity and Guaranty Company, a corporation, as principal, and Fidelity and Deposit Company of Maryland, a corporation, authorized and licensed to do business within the State of Montana, as surety, are held and firmly bound unto the plaintiff above named, in the penal sum of Three

Hundred and no/100 Dollars ($300.00), lawful money of the United States, to be paid to the said plaintiff, her heirs, executors, administrators, successors and assigns, for which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents,

Whereas, the above entitled suit was brought by the above named plaintiff in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, against the above named defendant, and is now pending in said state court and is removable into the District Court of the United States for the District of Montana, and the said defendant, United States Fidelity and Guaranty [17] Company, a corporation, has petitioned said State Court for such removal,

Now, Therefore, if the said defendant shall enter in the said District Court of the United States within thirty days from the date of filing said petition as provided by law, a certified copy of the records of said suit, and shall well and truly pay all costs that may be awarded by said District Court of the United States, if it shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise it shall remain in full force and virtue.

Sealed with our seals and dated the 19th day of June, 1939.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,
(Corporate Seal) By DON W. JACOBUS
Manager and Attorney-in-fact
Principal.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation,
(Corporate Seal) By A. B. KALIN
Its Attorney-in-Fact
Surety.

I hereby approve the above bond this 20th day of June, 1939.

H. H. EWING
Judge.

[Endorsed]: Filed July 20, 1940. C. R. Garlow, Clerk. [18]

In the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade.

ETHEL M. DOHENY, as Administratrix of the Estate of Roberta Doheny, Deceased,

Plaintiff,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Defendant.

ORDER

The defendant herein, United States Fidelity and Guaranty Company, a corporation, having within the time provided by law, filed its petition for removal in this cause to the District Court of the United States for the District of Montana, and having at the same time offered its bond in the sum of Three Hundred Dollars ($300.00), with good and sufficient surety, pursuant to statute, and conditioned to law;

It Is Ordered by the Court that said Petition be accepted; that said Bond be approved and accepted; that this cause be removed for trial to the District Court of the United States for the District of Montana, pursuant to the statute of the United States; and that all other proceedings in this Court be stayed.

Dated this 27th day of June, 1939.

H. H. EWING

Judge.

[Endorsed]: Filed July 20, 1940. C. R. Garlow, Clerk. [19]

In the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade.

ETHEL M. DOHENY, as Administratrix of the Estate of ROBERTA DOHENY, deceased,
Plaintiff,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation,
Defendant.

CLERK'S CERTIFICATE

I, George Harper, Clerk of the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, do hereby certify that the above and foregoing transcript contains full, true and correct copies of the original papers filed in this Court in the case of Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, deceased, vs. United States Fidelity and Guaranty Company, a corporation, No. 28770, said record consisting of the Complaint, filed in said suit on the 2nd day of June, 1939, the Petition for Removal of said suit to the United States District Court for the District of Montana, filed in said suit on the 20th day of June, 1939, the Bond for Re-

moval, the Notice of Petition and Bond, and the Order of Removal of suit to said United States District Court for the District of Montana, entered on record in said suit on the 27th day of June, 1939. [20]

And I further certify that said transcript is by me transmitted to the District Court of the United States in and for the District of Montana, Great Falls Division, pursuant to such order of removal.

Witness my hand and the seal of said Court at Great Falls, Montana, this 20th day of July, 1939.

(Seal) GEORGE HARPER
Clerk of Court.
By THOMAS T. DAVIES
Deputy

[Endorsed]: Filed July 20, 1939. C. R. Garlow, Clerk. [21]

In the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade.

ETHEL M. DOHENY, as Administratrix of the Estate of Marguerite Doheny, Deceased,
Plaintiff,

v.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation,
Defendant.

COMPLAINT

The plaintiff for her cause of action against the defendant complains and alleges:

I.

The plaintiff is informed and believes and therefore alleges that at all times hereinafter mentioned the defendant, United States Fidelity and Guaranty Company, was and still is a corporation created, organized and existing under and by virtue of the laws of the State of Maryland and authorized to do and doing business within the State of Montana.

II.

That on or about the 8th day of April, 1935, plaintiff was, by an order of the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, appointed Administratrix of the Estate of Marguerite Doheny, Deceased, by an order of said court, duly given, made and entered on said date in the matter of the Estate of Marguerite Doheny, Deceased, and thereafter letters of administration in the Estate of Marguerite Doheny, Deceased, were duly issued to plaintiff under the seal of said court and the hand of the Clerk of said court and that at all times since plaintiff has been and still is the duly appointed, qualified and acting administratrix of the Estate of Marguerite Doheny, Deceased. [22]

III.

That on or about the 20th day of September, 1934,

John M. Coverdale and E. O. Johnson, as co-partners, doing business under the firm name of Coverdale & Johnson, made and entered into a certain written agreement with the State of Montana for the performance by said co-partners of certain work and furnishing certain materials constituting improvements on a public highway known as the "Augusta-Sun River Road" in Lewis and Clark County, Montana, wherein and whereby the said co-partners promised and agreed to perform the work and furnish the materials in accordance with the terms of said contract in consideration of the payment of said co-partners by the State of Montana of the sum of approximately Fifteen Thousand, Six Hundred Fifteen and Sixty-six Hundredths Dollars ($15,615.66) in accordance with the terms of said agreement. That under the terms of said agreement the said co-partners promised and agreed to furnish a good and sufficient surety bond in the amount of $15,615.66 to be conditioned for the faithful performance of the covenants and agreements set forth in said agreement and to be by said co-partners performed and thereafter pursuant thereto the said co-partners, as Principal, and said United States Fidelity and Guaranty Company, as Surety, made, entered into and delivered to the State of Montana a certain agreement designated "Contract Bond" which said agreement was conditioned for the faithful performance in all respects of the provisions of said contract by the said co-partners and recited the sum of $15,615.66 as the penalty thereof.

IV.

That under the terms and provisions of Paragraph 7.11 of section 7 of said written agreement between the aforesaid co-partners and the State of Montana for the performance of work and furnishing of materials described therein, the said co-partners promised and agreed to carry public liability insurance to indemnify the public for injuries or damages sustained by reason of the carrying on the work in the amount of at least $10,000.00 for one person and a [23] total of $20,000.00 for one accident and promised to submit adequate evidence to the State Highway Commission of the State of Montana of taking out such public liability insurance and thereafter as evidence of taking out of said public liability insurance the defendant United States Fidelity and Guaranty Company notified the Montana Highway Commission in writing on or about October 1st, 1934, that said defendant corporation had issued contractors' public liability insurance policy for said co-partners under said contract with a liability of $10,000.00 for one person and $20,000.00 for one accident. That plaintiff has heretofore demanded the original or a copy of said public liability insurance policy from the said co-partners and from the defendant, United States Fidelity and Guaranty Company, and said co-partners and said defendant have failed and refused to furnish either thereof and that plaintiff is informed and believes and therefore alleges that under the provisions of said insurance policy and in accord-

ance with the provisions of the agreement between the said co-partners and the State of Montana the defendant corporation promised and agreed to pay all claims from liability imposed upon the aforesaid co-partners by law for damages on account of bodily injuries including death at any time resulting therefrom sustained by any of the public by reason of the carrying on of the work mentioned and described in the contract between said co-partners and the State of Montana in connection with the public Highway mentioned in said contract, and expressly provided in said policy that any person of the public sustaining injuries and damages as aforesaid or his or her personal representative was authorized to institute and maintain an action against the defendant corporation for the amount of any judgment obtained in an action theretofore brought against the said co-partners for such damages and injuries in case execution on said judgment against the said co-partners be returned unsatisfied.

V.

That thereafter and on or about the 12th day of December, 1934, and while carrying on the work mentioned and described in the [24] written agreement between the co-partners and the State of Montana the aforesaid co-partners operated a certain automobile in such a grossly negligent and reckless manner as to injure and kill one Marguerite Doheny and that at the time the said Marguerite Doheny was a member of the public and said automobile was

then and there being used in carrying on the work under aforesaid agreement and that thereafter in an action instituted in the District Court of the Eighth Judicial District in the State of Monana in and for the County of Cascade by the above named plaintiff and against the aforesaid co-partners to recover for the injuries and damages sustained by said Marguerite Doheny and her resulting death as the proximate result of the reckless and grossly negligent operation of said automobile as aforesaid, a judgment in the sum of $5,116.89 was duly given, made and entered by said Court in favor of the said plaintiff and against the said co-partners on the 4th day of May, 1936, and that neither said judgment nor any part thereof has been paid by said co-partners or by the defendant, United States Fidelity and Guaranty Company, although demand of payment thereof has heretofore been made by plaintiff.

VI.

That thereafter the said co-partners appealed to the Supreme Court of the State of Montana from said judgment and thereafter on the 20th day of May, 1937, the judgment of the aforesaid District Court was affirmed and sustained by the Supreme Court of the State of Montana and remittitur on said judgment was issued by the Supreme Court to the aforesaid District Court and thereafter filed in said District Court on the 5th day of June, 1937. That neither said judgment nor any part thereof nor the interest thereon has been paid and that

plaintiff still is the owner and holder of said judgment.

VII.

That thereafter on or about the 17th day of August, 1937, an execution was issued and placed in the hands of the Sheriff of Deer Lodge County, State of Montana, the place of residence and principal place of business of the aforesaid co-partners, requiring [25] the Sheriff to satisfy aforesaid judgment out of the property of said co-partners and that said execution was returned to the District Court of Cascade County, on or about the 10th day of September, 1937, unsatisfied and bearing the certificate of the Sheriff that he returned said execution wholly unsatisfied because no personal or real property of said co-partners could be found.

VIII.

That the said co-partners had fully complied with all the requirements and conditions precedent enumerated in the aforesaid policy and that plaintiff has complied with all the requirements and conditions precedent and is entitled to maintain this action against the defendant, United States Fidelity and Guaranty Company, to recover the sum of $5,116.89 and accrued and accruing interest thereon from May 4, 1936, and became so entitled to maintain said action on or about the 10th day of September, 1937, upon the return of the execution not satisfied and by virtue of the judgment rendered and against the said co-partners and finally deter-

mined by the aforesaid Supreme Court on appeal on or about the 5th day of June, 1937.

IX.

That plaintiff is informed and believes and therefore alleges that the defendant, United States Fidelity and Guaranty Company retained attorneys and paid the said attorneys for their services in conducting the defense by the co-partners of the action instituted in the District Court aforesaid and that said defendant retained the attorneys and paid for their services rendered and paid the expenses connected with the appeal of the aforesaid action to the Supreme Court of the State of Montana from the judgment given, made and entered by the aforesaid District Court in said action.

X.

That heretofore on or about May 13th, 1938, the said plaintiff demanded payment of the aforesaid judgment from the defendant, a true and correct copy of which written demand so made upon the said defendant is hereto annexed marked "Exhibit A" and by this reference [26] made a part hereof. That said defendant has failed to make payment of said judgment either in whole or in part.

Wherefore, Plaintiff prays judgment against the defendant for the sum of $5,116.89 and interest thereon at the rate of Six Per Cent (6%) per annum from May 4, 1936, and costs of this action and for such other and further relief as may be equitable, just and proper.

E. J. McCABE

Attorney for Plaintiff.

State of Montana
County of Cascade—ss.

E. J. McCabe being first duly sworn deposes and says:

That he is the attorney for plaintiff named in the foregoing complaint, and makes this verification for the reason that plaintiff is absent from Cascade County, Montana, wherein affiant resides and maintains his office and where this verification is made:

That affiant has read the foregoing complaint, knows the contents thereof and that same is true to the best knowledge, information and belief of this affiant.

E. J. McCABE

Subscribed and sworn to before me this 24th day of April, 1939.

(Notarial Seal) KATHLEEN SMESTAD
Notary Public for the State of Montana, Residing at Great Falls, Montana.

My commission expires Mar. 31, 1942. [27]

"EXHIBIT A"

Great Falls, Montana
May 13, 1938

United States Fidelity and Guaranty Company
Baltimore, Maryland
Gentlemen:

On or about the 20th day of September, 1934, John M. Coverdale and E. O. Johnson, co-partners

doing business under the name of Coverdale and Johnson, entered into a written contract with the State Highway Commission of the State of Montana for the performance of certain work and the furnishing of certain materials constituting improvements on a public highway known as the "Augusta-Sun River Road" in Lewis and Clark County, Montana. At the time of the making of said contract the said John M. Coverdale and E. O. Johnson, co-partners as aforesaid, as Principal and your Company as surety, executed and delivered a certain contract bond in writing in the principal sum of $15,615.66, the condition of which bond was that the aforesaid co-partners would in all respects faithfully perform all of the provisions of the aforesaid contract between said co-partners and the State of Montana acting by and through the State Highway Commission.

The aforesaid Highway Contract contained the following provision:

> "The Contractor shall carry public liability insurance to indemnify the public for injuries or damages sustained by reason of the carrying on the work. This insurance shall be in the amount of at least $10,000.00 for one person and a total of $20,000.00 for one accident. The Contractor shall submit adequate evidence to the Commission that he has taken out this insurance."

Thereafter your Company notified the State Highway Commission of Montana by written com-

munication that you had written a public liability policy of insurance in accordance with the terms and provisions of aforesaid contract to and with the aforesaid co-partners in the amount of $10,000.00 for one person and a total of $20,000.00 for one accident. Thereafter, one Marguerite Doheny was killed as a result of the grossly negligent and reckless operation of an instrumentality being used by said co-partners at the time in carrying on the prosecution of the work under aforesaid Highway contract. An action was thereafter instituted in the District Court of the 8th Judicial District of the State of Montana in and for the County of Cascade by the undersigned, Ethel M. Doheny, as Administratrix of the estate of Marguerite Doheny, deceased, to recover from said co-partners damages by reason of the injuries and death of aforesaid Marguerite Doheny by reason of the alleged grossly negligent and reckless operation of aforesaid instrumentality while carrying on the prosecution of work under the aforesaid Highway contract, in which action a judgment was duly given, made and entered by said Court on the verdict on the 4th day of May, 1936, of the jury empanelled to try said action against the said co-partners, as defendants, for the sum of $5000.00 together with the additional sum of $116.89 costs together with interest thereon at the rate of 6% per annum, and which action was defended at your direction by Attorneys employed by your Company and to whom you paid and Attorney's fee for their services rendered in said action.

[28]

An appeal was taken to the Supreme Court of Montana from the judgment in said action by aforesaid Attorneys at your suggestion and the services of said Attorneys rendered on said appeal were paid by your Company. Thereafter, the judgment of the lower Court was duly affirmed by the Supreme Court. Said judgment has not been paid nor any part thereof and the undersigned as Administratrix aforesaid still is the owner and holder of said Judgment.

At the direction of the undersigned, E. J. McCabe, her attorney, made oral demand for payment of the aforesaid judgment upon Don Jacobus, your agent at Helena, Montana, and was informed by said agent that your Company claimed non-liability for payment of said judgment and refused payment thereof.

An execution on aforesaid judgment has been heretofore duly issued and delivered to the Sheriff for levy and enforcement of said judgment against property of aforesaid co-partners and the said execution has been returned unsatisfied either in part or in whole by reason of inability to locate any property of aforesaid co-partners.

At the direction of the undersigned, her aforesaid Attorney has conducted an investigation for the purpose of finding any property of aforesaid co-partners available for execution and no property of any kind has been located.

Demand is hereby made that you pay the undersigned, as Administratrix, aforesaid, the aforesaid

judgment in the sum of $5,116.89 with interest from May 4th, 1936, at the rate of 6% per annum, and in the event of your failure to comply with this demand, notice is hereby given that the undersigned will institute suit to enforce payment of said judgment.

A copy of the within demand is being delivered to your agent at Helena, Montana.

Very truly yours,
ETHEL M. DOHENY
414 Strain Building
Great Falls, Montana

[Endorsed]: Filed July 20, 1939. C. R. Garlow, Clerk. [29]

In the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade

ETHEL M. DOHENY, as Administratrix of the Estate of Marguerite Doheny, Deceased,
Plaintiff,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,
Defendant.

PETITION FOR REMOVAL

Comes now United States Fidelity and Guaranty Company, a corporation, the defendant named in

the above entitled action and makes and presents this its petition for removal of the above entitled action to the District Court of the United States for the District of Montana, and respectfully shows and alleges as follows:

I.

That the above entitled action is an action in which there is a controversy which is wholly between citizens of different states. That the plaintiff in said action was, at the occurrences relied upon in the complaint, and at the time of the commencement of this action, and still is, a resident and citizen of the State of Montana.

II.

That the defendant, United States Fidelity and Guaranty Company is now, and at all of the times mentioned in plaintiff's complaint has been, and was at the time of the commencement of the above entitled action, a corporation duly [30] organized and existing under and by virtue of the laws of the State of Maryland, licensed to do business in Montana, and a citizen and resident of the State of Maryland, and a non-resident of the State of Montana.

III.

That on or about the 2nd day of June, 1939, the plaintiff herein filed the above entitled action against the above named defendant in the District Court of the Eighth Judicial District of the State

of Montana, in and for the County of Cascade, said action being Cause No. 28769 in said court and district. That in the above entitled action the plaintiff seeks to recover from the defendant United States Fidelity and Guaranty Company, a corporation, the sum of Five Thousand One Hundred Sixteen and 89/100 Dollars ($5116.89) which amount allegedly represents the amount of a certain judgment given, made and entered by the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, in favor of the above named plaintiff in an action by the above named plaintiff against John M. Coverdale and E. O. Johnson, as co-partners, doing business under the firm name of Coverdale & Johnson.

That in the above entitled action the pliantiff seeks to recover the amount of said judgment, to-wit, the sum of Five Thousand One Hundred Sixteen and 89/100 Dollars ($5116.89), together with interest, from the defendant United States Fidelity and Guaranty Company on the ground that said defendant had issued to the said John M. Coverdale and E. O. Johnson as said co-partners, doing business under the firm name of Coverdale & Johnson, a contractors' public liability insurance policy with a liability of $10,000.00 for one [31] person and a total of $20,000.00 for one accident and plaintiff further alleges that by reason of the issuance of said policy of insurance the said defendant United States Fidelity and Guaranty Company is legally bound and obligated to pay the said judg-

ment in the amount of Five Thousand One Hundred Sixteen and 89/100 Dollars ($5116.89), together with interest from and after May 4, 1936.

That the matter and amount in dispute and controversy in said suit exceeds, exclusive of interest and costs, a sum or value of Three Thousand and no/100 Dollars ($3000.00), all of which more fully appear from the complaint in said action, which is hereby referred to and made a part hereof.

IV.

That the defendant makes and files herewith a bond in the sum of Three Hundred and no/100 Dollars ($300.00), with good and sufficient surety for their entering in the District Court of the United States for the District of Montana, within thirty days from the date of filing this petition a certified copy of the record in this suit and for paying all costs that may be awarded by said District Court of the United States, if it shall hold that this suit was wrongfully and improperly removed thereto.

Wherefore, this petitioner prays this court to proceed no further herein except to accept this petition and said bond and to make an order requiring said defendant to enter and file a certified copy of the record herein in the said District Court of the United States for the District of [32] Montana, within thirty days from the filing of this petition, as provided by law.

HOWARD TOOLE
W. T. BOONE
Attorneys for Defendant [33]

State of Montana,
County of Lewis and Clark—ss.

Don W. Jacobus, being first duly sworn upon his oath, deposes and says: That he is the Manager for the defendant, United States Fidelity and Guaranty Company, a corporation, and that he makes this verification as such manager for and on behalf of said defendant and that he is duly authorized to make the same; that he has read the foregoing petition and knows the contents thereof and that the matters and things therein stated are true.

DON W. JACOBUS

Subscribed and sworn to before me this 19th day of June, 1939.

[Seal] W. T. BOONE
Notary Public for the State of Montana.
Residing at Missoula, Montana.

My commission expires Aug. 2, 1941.

[Endorsed]: Filed July 20, 1939. C. R. Garlow, Clerk. [34]

In the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade

ETHEL M. DOHENY, as Administratrix of the Estate of Marguerite Doheny, Deceased,

Plaintiff,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Defendant.

NOTICE OF PETITION AND BOND FOR REMOVAL

To Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, the above named plaintiff:

To E. J. McCabe, plaintiff's attorney:

You and each of you are hereby notified that United States Fidelity and Guaranty Company, a corporation, the defendant in the above entitled action, will on the 27th day of June, 1939, file in said action in said Court, the petition and bond of said defendant, copies of which are hereto attached and served upon you, for removal of said cause to the District Court of the United States for the District of Montana, Great Falls Division, and will on said date at the hour of 10 o'clock A. M., or as soon thereafter as counsel can be heard, present said petition and bond so filed in the above entitled

Court, and move said Court for an order removing said cause to the District Court of the United States, for the District of Montana, in accordance with said Petition and Bond.

Dated this 19th day of June, 1939.

HOWARD TOOLE
W. T. BOONE
Attorneys for Defendant

[Endorsed]: Filed July 20, 1939. C. R. Garlow, Clerk. [35]

In the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade

ETHEL M. DOHENY, as Administratrix of the Estate of Marguerite Doheny, Deceased,
Plaintiff,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,
Defendant.

BOND ON REMOVAL

Know all men by these presents, That we, United States Fidelity and Guaranty Company, a corporation, as principal, and Fidelity and Deposit Company of Maryland, a corporation, authorized and

licensed to do business within the State of Montana, as surety, are held and firmly bound unto the plaintiff above named, in the penal sum of Three Hundred and no/100 Dollars ($300.00), lawful money of the United States, to be paid to the said plaintiff, her heirs, executors, administrators, successors and assigns, for which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents,

Whereas, the above entitled suit was brought by the above named plaintiff in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, against the above named defendant, and is now pending in said state court and is removable into the District Court of the United States for the District of Montana, and the said defendant, United States Fidelity and Guaranty [36] Company, a corporation, has petitioned said State Court for such removal,

Now, therefore, if the said defendant shall enter in the said District Court of the United States within thirty days from the date of filing said petition as provided by law, a certified copy of the records of said suit, and shall well and truly pay all costs that may be awarded by said District Court of the United States, if it shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise it shall remain in full force and virtue.

Sealed with our seals and dated the 19th day of June, 1939.

[Corporate Seal] UNITED STATES FIDELITY AND GUARANTY COMPANY
a corporation,
By DON W. JACOBUS
Manager and Attorney-in-fact
Principal

[Corporate Seal] FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
a corporation,
By A. B. KALIN
Its Attorney-in-Fact
Surety

I hereby approve the above bond this 20th day of June, 1939.

C. F. HOLT
Judge

[Endorsed]: Filed July 20, 1939. C. R. Garlow, Clerk. [37]

In the District Court of the Enghth Judicial District of the State of Montana, in and for the County of Cascade.

ETHEL M. DOHENY, as Administratrix of the Estate of Marguerite Doheny, Deceased,
Plaintiff,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,
Defendant,

ORDER

The defendant herein, United States Fidelity and Guaranty Company, a corporation, having within the time provided by law, filed its petition for removal in this cause to the District Court of the United States for the District of Montana, and having at the same time offered its bond in the sum of Three Hundred Dollars ($300.00), with good and sufficient surety, pursuant to statute, and conditioned to law;

It is ordered by the Court that said Petition be accepted; that said Bond be approved and accepted; that this cause be removed for trial to the District Court of the United States for the District of Montana, pursuant to the statute of the United States; and that all other proceedings in this Court be stayed.

Dated this 27th day of June, 1939.

C. F. HOLT

Judge.

[Endorsed]: Filed July 20, 1939, C. R. Garlow, Clerk. [38]

In the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade.

ETHEL M. DOHENY, as Administratrix of the Estate of MARGUERITE DOHENY, Deceased,

Plaintiff,

vs.

UNITED STATES FIDELITY and GUARANTY COMPANY, a corporation,

Defendant.

CLERK'S CERTIFICATE

I, George Harper, Clerk of the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, do hereby certify that the above and foregoing transcript contains full, true and correct copies of the original papers filed in this Court in the case of Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, deceased, vs. United States Fidelity and Guaranty Company, a corporation, No. 28769 said record consisting of the Complaint, filed in said

suit on the 2nd day of June, 1939, the Petition for Removal of said suit to the United States District Court for the District of Montana, filed in said suit on the 20th day of June, 1939, the Bond for Removal, the Notice of Petition and Bond, Affidavit, and the Order of Removal of suit to said United States District Court for the District of Montana, entered on record in said suit on the 27th day of June, 1939. [39]

And I further certify that said transcript is by me transmitted to the District Court of the United States in and for the District of Montana, Great Falls Division, pursuant to such order of removal.

Witness my hand and seal of said Court at Great Falls, Montana, this 20th day of July, 1939.

[Seal] GEORGE HARPER
Clerk of Court.
By THOMAS T. DAVIES
Deputy

[Endorsed]: Filed July 20, 1939, C. R. Garlow, Clerk. [40]

Thereafter, on July 24, 1939, a Motion to Dismiss was filed in each cause herein, said Motions to Dismiss being in the words and figures following, towit: [41]

In the District Court of the United States
District of Montana
Great Falls Division

No. 69

ETHEL M. DOHENY, as Administratrix of the Estate of Roberta Doheny, Deceased,

Plaintiff,

vs.

UNITED STATES FIDELITY and GUARANTY COMPANY, a corporation,

Defendant,

MOTION TO DISMISS

Now comes the defendant, the United States Fidelity and Guaranty Company, a corporation, and files this, its Motion to Dismiss, and moves the court for an order dismissing plaintiff's complaint upon the following grounds and for the following reasons:

I.

That said complaint fails to state a claim upon which relief can be granted.

HOWARD TOOLE
W. T. BOONE
Attorneys for Defendant

[Endorsed]: Filed July 24, 1939, C. R. Garlow, Clerk. [42]

In the District Court of the United States
District of Montana
Great Falls Division

No. 70

ETHEL M. DOHENY, as Administratrix of the Estate of Marguerite Doheny, Deceased,
Plaintiff,

vs.

UNITED STATES FIDELITY and GUARANTY COMPANY, a corporation,
Defendant.

MOTION TO DISMISS

Now comes the defendant, the United States Fidelity and Guaranty Company, a corporation, and files this, its Motion to Dismiss, and moves the court for an order dismissing plaintiff's complaint upon the following grounds and for the following reasons:

I.

That said complaint fails to state a claim upon which relief can be granted.

HOWARD TOOLE
W. T. BOONE
Attorneys for Defendant

[Endorsed]: Filed July 24, 1939, C. R. Garlow, Clerk. [43]

Thereafter, on July 24, 1939, a Motion to Strike was filed in each cause herein, said Motions to Strike being in the words and figures following, to-wit: [44]

[Title of District Court and Cause—No. 69.]

MOTION TO STRIKE

Now comes the defendant, the United States Fidelity and Guaranty Company, a corporation, and files this, its Motion to Strike, and moves the court for an order striking the following portions of plaintiff's complaint on file herein, for the following reasons:

I.

That part of Paragraph III of plaintiff's complaint from and including the word "that" on Line 14 to and including the word "thereof" on Line 25, all on Page 2, for the reason and upon the ground that said portion of Paragraph III is redundant, immaterial, impertinent and surplusage.

HOWARD TOOLE
W. T. BOONE
Attorneys for Defendant

[Endorsed]: Filed July 24, 1939. [45]

[Title of District Court and Cause—No. 70.]

MOTION TO STRIKE

Now comes the defendant, the United States Fidelity and Guaranty Company, a corporation,

and files this, its Motion to Strike, and moves the court for an order striking the following portions of plaintiff's complaint on file herein, for the following reasons:

I.

That part of Paragraph III of plaintiffs' complaint from and including the word "that" on Line 14 to and including the word "thereof" on Line 25, all on Page 2, for the reason and upon the ground that said portion of Paragraph III is redundant, immaterial, impertinent and surplusage.

HOWARD TOOLE
W. T. BOONE
Attorneys for Defendant

[Endorsed]: Filed July 24, 1939. [46]

Thereafter, on September 8, 1939, the Motions to Strike, and Motions to Dismiss, were overruled and denied, the record of hearing thereon, and order thereon, being in the words and figures following, towit: [47]

[Title of District Court and Cause—No. 69]

This cause was duly called for hearing this day on defendant's motion to strike from the complaint and on defendant's motion to dismiss, Mr. E. J. McCabe appearing for the plaintiff and there being no appearance by counsel for the defendant.

And thereupon, after hearing the argument of counsel for plaintiff court ordered that both of said motions be overruled and denied, and that defendant be granted ten days from receipt of notice of this ruling within which to answer.

Entered in open court on September 8, 1939, at Great Falls, Montana.

C. R. GARLOW,
Clerk [48]

[Title of District Court and Cause—No. 70]

This cause was duly called for hearing this day on defendant's motion to strike from the complaint and on defendant's motion to dismiss, Mr. E. J. McCabe appearing for the plaintiff and there being no appearance by counsel for the defendant.

And thereupon, after hearing the argument of counsel for plaintiff, court ordered that both of said motions be overruled and denied, and that defendant be granted ten days from receipt of notice of this ruling within which to answer.

Entered in open court this 8th day of September, 1939, at Great Falls, Montana.

C. R. GARLOW,
Clerk [49]

Thereafter, on September 23, 1939, an Answer was filed in each of the causes herein, being in the words and figures following, towit: [50]

[Title of District Court and Cause—No. 69]

ANSWER

Comes now the above named defendant, United States Fidelity and Guaranty Company, a corporation, and for its answer to plaintiff's complaint on file herein admits, denies and alleges:

I.

The defendant admits the allegations contained in paragraphs I, II and III of plaintiff's complaint.

II.

Answering paragraph IV of plaintiff's complaint the defendant admits that under the provisions of pargaraph 7.11 of Section 7 of the written agreement between the co-partners, Coverdale & Johnson and the State of Montana, the co-partners promised and agreed to carry public liability insurance on the work and that the defendant issued to said co-partners, Coverdale & Johnson, a contractor's public liability insurance policy and notified the Montana Highway [51] Commission in writing that said contractor's public liability insurance policy had been issued to said co-partners, Coverdale & Johnson. In this connection the defendant alleges that said contractor's public liability insurance policy so issued by it to said co-partners, Coverdale & Johnson, contained an exclusion under which the

driving or using of any vehicle or automobile was excepted from the coverage provided in said policy.

The defendant denies each, every and all of the other allegations contained in said paragraph IV of plaintiff's complaint.

III.

Answering paragraphs V, VI and VII of plaintiff's complaint the defendant alleges that it has not sufficient knowledge or information upon which to base a belief with respect to the allegations therein contained and therefore denies said paragraphs and each and all of the allegations therein contained.

IV.

The defendant denies each, every and all of the allegations contained in paragraph VIII of plaintiff's complaint.

V.

The defendant denies each, every and all of the allegations contained in paragraph IX of plaintiff's complaint and in this connection alleges that such legal services and investigation as were furnished by the defendant were furnished under the provisions of said contractor's public liability insurance policy notwithstanding the provision therein excepting liability in the using or driving of [52] vehicles or automobiles.

VI.

Answering paragraph X of plaintiff's complaint the defendant admits that on or about May 13th,

1938, plaintiff served defendant with a letter, copy of which is attached to plaintiff's complaint as Exhibit "A", and admits that the defendant has not paid said alleged judgment either in whole or in part.

VII.

Further answering plaintiff's complaint the defendant denies each, every and all of the allegations therein contained and not hereinbefore specifically admitted, qualified or denied.

Wherefore, having fully answered plaintiff's complaint, the defendant prays that plaintiff take nothing by her said complaint and that the defendant recover its costs herein disbursed and expended.

HOWARD TOOLE
W. T. BOONE
Attorneys for Defendant.

[53]

State of Montana
County of Missoula—ss.

W. T. Boone, being first duly sworn, upon his oath, deposes and says: That he is one of the attorneys for the defendant in the above entitled action; that he makes this verification for and on behalf of said defendant for the reason that the defendant, United States Fidelity and Guaranty Company is a corporation and has no officer or agent within the county where affiant resides and has his office; that he has read the foregoing Answer and knows the contents thereof and that the matters

and things therein stated are true to the best of his knowledge, information and belief.

W. T. BOONE

Subscribed and sworn to before me this 22nd day of September, 1939.

[Seal] MARY O. CLASBEY

Notary Public for the State of Montana; residing at Missoula, Montana.

My commission expires Oct. 4, 1940.

[Endorsed]: Filed Sept. 23, 1939. [54]

[Title of District Court and Cause—No. 70.]

ANSWER

Comes now the above named defendant, United States Fidelity and Guaranty Company, a corporation, and for its answer to plaintiff's complaint on file herein admits, denies and alleges:

I.

The defendant admits the allegations contained in paragraphs I, II and III of plaintiff's complaint.

II.

Answering paragraph IV of plaintiff's complaint the defendant admits that under the provisions of paragraph 7.11 of Section 7 of the written agreement between the co-partners, Coverdale & Johnson and the State of Montana, the co-partners promised

and agreed to carry public liability insurance on the work and that the defendant issued to said co-partners, Coverdale & Johnson, a contractor's public liability insurance policy and notified the Montana Highway [55] Commission in writing that said contractor's public liability insurance policy had been issued to said co-partners, Coverdale & Johnson. In this connection the defendant alleges that said contractor's public liability insurance policy so issued by it to said co-partners, Coverdale & Johnson, contained an exclusion under which the driving or using of any vehicle or automobile was excepted from the coverage provided in said policy.

The defendant denies each, every and all of the other allegations contained in said paragraph IV of plaintiff's complaint.

III.

Answering paragraphs V, VI and VII of plaintiff's complaint the defendant alleges that it has not sufficient knowledge or information upon which to base a belief with respect to the allegations therein contained and therefore denies said paragraphs and each and all of the allegations therein contained.

IV.

The defendant denies each, every and all of the allegations contained in paragraph VIII of plaintiff's complaint.

V.

The defendant denies each, every and all of the allegations contained in paragraph IX of plaintiff's complaint and in this connection alleges that such legal services and investigation as were furnished by the defendant were furnished under the provisions of said contractor's public liability insurance policy notwithstanding the provision therein excepting liability in the using or driving of [56] vehicles or automobiles.

VI.

Answering paragraph X of plaintiff's complaint the defendant admits that on or about May 13th, 1938, plaintiff served defendant with a letter, copy of which is attached to plaintiff's complaint as Exhibit "A", and admits that the defendant has not paid said alleged judgment either in whole or in part.

VII.

Further answering plaintiff's complaint the defendant denies each, every and all of the allegations therein contained and not hereinbefore specifically admitted, qualified or denied.

Wherefore, having fully answered plaintiff's complaint, the defendant prays that plaintiff take nothing by her said complaint and that the defendant recover its costs herein disbursed and expended.

HOWARD TOOLE
W. T. BOONE
Attorneys for Defendant. [57]

State of Montana,
County of Missoula—ss.

W. T. Boone, being first duly sworn, upon his oath, deposes and says: That he is one of the attorneys for the defendant in the above entitled action; that he makes this verification for and on behalf of said defendant for the reason that the defendant, United States Fidelity and Guaranty Company is a corporation and has no officer or agent within the county where affiant resides and has his office; that he has read the foregoing Answer and knows the contents thereof and that the matters and things therein stated are true to the best of his knowledge, information and belief.

W. T. BOONE

Subscribed and sworn to before me this 22nd day of September, 1939.

[Seal] MARY O. CLASBEY
Notary Public for the State of Montana; residing at Missoula, Montana.

My commission expires Oct. 4, 1940.

[Endorsed]: Filed Sept. 23, 1939. [58]

Thereafter, on October 10, 1940, a Transcript of Proceedings was filed herein, in the words and figures following, towit: [59]

In the District Court of the United States, District of Montana, Great Falls Division.

No. 69

ETHEL M. DOHENY, as Administratrix of the Estate of Roberta Doheny, Deceased,

Plaintiff,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Defendant,

and

No. 70

ETHEL M. DOHENY, as Administratrix of the Estate of Marguerite Doheny, Deceased,

Plaintiff,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Defendant.

DEFENDANT'S PROPOSED TRANSCRIPT OF PROCEEDINGS

Appearances:

For Plaintiff:

E. J. McCabe,
Attorney at Law,
Great Falls, Montana.

For Defendant:

Toole & Boone,
Attorneys at Law,
Missoula, Montana. [60]

[Title of District Court and Causes.]

Be it remembered: That the above entitled causes came on regularly for trial at Great Falls, Montana, on Tuesday, the 26th day of December, 1939, at 2:00 o'clock P. M., before the Honorable Charles N. Pray, Judge Presiding, sitting without a jury. The plaintiff, in each of said causes, was personally present in Court and represented by her Attorney, E. J. McCable of Great Falls, Montana. The defendant, in each of said causes, was represented by Messrs. Toole & Boone of Missoula, Montana.

Thereupon the following proceedings were had and taken and the following evidence was introduced:

The Court: We have two cases on the calendar for this afternoon. Are you ready for the plaintiff?

Mr. McCabe: Plaintiff is ready.

The Court: Is the defendant ready?

Mr. Toole: Defendant is ready.

The Court: Very well. These cases, as I understand it, are to be consolidated?

Mr. McCabe: Yes, your Honor.

The Court: Any objection?

Mr. Toole: No objection.

The Court: Very well. Call your first witness.

Plaintiff's Case

Whereupon,

JULIUS G. HILGARD,

a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination

By Mr. McCabe:

Q. What is your name?

A. Julius G. Hilgard.

Mr. Toole: The defendant, in both of these cases, objects to the introduction of any evidence on the ground and for the [61] reason that the complaints in these actions do not state facts sufficient upon which to base a claim against the defendant.

The Court: I will overrule the objection. Proceed.

The Witness: I hold the official position of Deputy Clerk of Court of the County of Cascade, State of Montana, and as such have the custody

(Testimony of Julius G. Hilgard.)

of the records and files of all actions instituted, pending and disposed of in the District Court of Cascade County, Montana. Being shown proposed exhibits numbered 1 to 25 inclusive, and having examined the same I will state they are official District Court records of Cascade County in the case appearing on each exhibit.

Mr. Toole: They can all be offered together. The same objection will go to all of them.

Mr. McCabe: Let the record show that the offering of these individual exhibits separately is dispensed with, and they may be offered in a group. We offer plaintiff's exhibits 1 to 25 inclusive. Counsel, I believe, stated that he would stipulate that both of these cases were tried as consolidated in the District Court of Cascade County and in the Supreme Court of Montana and both judgments were affirmed. That is stipulated to, is it not?

Mr. Toole: I don't think I could stipulate exactly in that language. I am prepared to stipulate that the offered exhibits are the originals and authenticated documents filed in the office of the Clerk of Court of Cascade County; that the remittitur is the authenticated document from the Supreme Court; that the Bill of Exceptions is the actual Bill of Exceptions that was settled in the consolidated cases; that no objection is made to the authentication of the documents offered. [62]

The Court: What is your objection to the offer?

Mr. Toole: Now, if your Honor please, the de-

(Testimony of Julius G. Hilgard.)

fendant objects to all the documents offered first, because they are immaterial in this action, secondly, because they serve only to encumber the record, and in the third place the documents do not offer any proof of any of the facts pleaded in plaintiff's complaint, with the exception of the two judgments and the remittitur, and for that reason they are immaterial, and do not tend to prove or disprove any issue in this case.

The Court: Do you deny them in your answer?

Mr. Toole: I think some of them are denied.

The Court: I think you have denied everything in the answer.

Mr. Toole: Practically.

The Court: What is your further objection?

Mr. Toole: I want to say for the Court, and for the record, that the pleadings in these cases plead certain facts. The defendant objects to all of the exhibits, because all of the facts there pleaded were denied in the lower court, and most of those facts are here denied. If the same exhibits were offered separately, they could be objected to on that basis here.

The Court: All the pleadings are offered here, are they not?

Mr. McCabe: Yes.

Mr. Toole: And there is no substantive proof of those exhibits of any kind whatever.

The Court: I will overrule the objection. They are admitted in evidence. Proceed with your examination.

(Testimony of Julius G. Hilgard.)

Whereupon, plaintiff's exhibits 1 to 25, both inclusive, were received in evidence and filed with the Clerk of the [63] Court and said exhibits bear the following titles:

Plaintiff's Exhibit 1, Original Complaint in the District Court of Cascade County, Montana, in the case of Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 2, Original Separate Answer of Defendant John M. Coverdale in said case of Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 3, Original Separate Answer of Defendant Coverdale & Johnson, a co-partnership in said case of Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 4, Original Reply to Separate Answer of Defendants Coverdale & John-

(Testimony of Julius G. Hilgard.)

son, a co-partnership, in said case of Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, Plaintiff vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 5, Original Reply to Separate Answer of Defendant John M. Coverdale in said case of Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 6, Original Affidavit of Service in said case of Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 7, Original Order Taxing Costs and Disbursements in said case of Ethel M. Doheny, as Administratrix of the [64] Estate of Roberta Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 8, Original Verdict in said case of Ethel M. Doheny, as Administra-

(Testimony of Julius G. Hilgard.)

trix of the Estate of Roberta Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 9, Original Judgment on Verdict in said case of Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 10, Original Notice of Appeal in said case of Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 11, Original Remittitur from the Supreme Court of the State of Montana affirming the judgment in said case of Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson, co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 12, Original Notice of Filing Remittitur in said case of Ethel M. Doheny, as Administratrix of the Estate of Ro-

(Testimony of Julius G. Hilgard.)

berta Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 13, Original Writ of Execution in said case of Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 14, Original Complaint in the District Court of Cascade County, Montana, in the case of Ethel M. Doheny, as Administratrix of the Estate of Marguerite [65] Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 15, Original Separate Answer of Defendant Coverdale & Johnson, a copartnership in said case of Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 16, Original Separate Answer of Defendant John M. Coverdale in said case of Ethel M. Doheny, as Administratrix of

(Testimony of Julius G. Hilgard.)

the Estate of Marguerite Doheny, deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 17, Original Reply to Separate Answer of Defendant John M. Coverdale in said case of Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 18, Original Reply to Separate Answer of Defendants Coverdale & Johnson, a co-partnership, in said case of Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 19, Original Affidavit of Service in said case of Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 20, Original Verdict in said case of Ethel M. Doheny, as Administra-

(Testimony of Julius G. Hilgard.)

trix of the Estate of Marguerite Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants. [66]

Plaintiff's Exhibit 21, Original Judgment on Verdict in said case of Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 22, Original Notice of Appeal in said case of Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 23, Original Notice of Filing Remittitur in said case of Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 24, Original Writ of Execution in said case of Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, Plaintiff, vs. John M. Cover-

(Testimony of Julius G. Hilgard.)

dale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 25, Original Bill of Exceptions in the cases of Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants, and Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

[67]

PLAINTIFF'S EXHIBIT 9

[Title of District Court.]

ETHEL M. DOHENY, as Administratrix of the Estate of Roberta Doheny, Deceased,

Plaintiff,

vs.

JOHN M. COVERDALE and E. O. JOHNSON co-partners doing business under the firm name and style of COVERDALE & JOHNSON,

Defendants.

JUDGMENT ON VERDICT

This action came on regularly for trial upon the 29th day of April, 1936, the said parties ap-

(Testimony of Julius G. Hilgard.)

peared by their Attorneys Messrs. Hall & McCabe and Edw. C. Alexander Counsel for Plaintiff, and Messrs. Howard Toole and W. T. Boone for Defendants. A jury of twelve persons was regularly empaneled and sworn to try said cause. Witnesses on the part of Plaintiff and Defendants were sworn and examined. After hearing the evidence, the arguments of Counsel and instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into Court their verdict as follows:

> "We, the jury in the above entitled action, find in favor of the plaintiff, Ethel M. Doheny, as administratrix of the Estate of Roberta Doheny, deceased, and against the defendants, John M. Coverdale and E. O. Johnson, co-partners doing business under the firm name and style of Coverdale & Johnson, in the sum of $5,000.00.
>
> Dated this 2nd day of May, 1936.
>
> CLARENCE W. WILSON
> Foreman." [68]

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed that the plaintiff, Ethel M. Doheny, as administratrix of the Estate of Roberta Doheny, deceased, have judgment against the defendants, John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson in the sum of $5,000.00 and

(Testimony of Julius G. Hilgard.)
that said plaintiff have judgment against said defendants for her costs herein in the sum of $243.26.

Judgment entered this 4th day of May A. D. 1936.

(Court Seal) GEORGE HARPER
Clerk.
By J. G. HILGARD
Deputy Clerk.

PLAINTIFF'S EXHIBIT 21

[Title of District Court.]

ETHEL M. DOHENY, as administratrix of the Estate of Marguerite Doheny, deceased,
Plaintiff,

vs.

JOHN M. COVERDALE and E. O. JOHNSON co-partners doing business under the firm name and style of COVERDALE & JOHNSON,
Defendants.

JUDGMENT ON VERDICT

This action came on regularly for trial upon the 29th day of April, 1936, the said parties appeared by their Attorneys Messrs. Hall & McCabe and Edw. C. Alexander Counsel for Plaintiff, and Messrs. Howard Toole and W. T. Boone for Defendants. A jury of twelve persons was regularly

(Testimony of Julius G. Hilgard.)

empaneled and sworn to try said cause. Witnesses on the part of Plaintiff and [69] Defendants were sworn and examined. After hearing the evidence, the arguments of Counsel and instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into Court their verdict as follows:

> "We, the jury in the above entitled action, find in favor of the plaintiff, Ethel M. Doheny, as administratrix of the Estate of Marguerite Doheny, Deceased, and against the defendants, John M. Coverdale and E. O. Johnson, co-partners doing business under the firm name and style of Coverdale & Johnson, in the sum of $5,000.00.
>
> Dated this 2nd day of May, 1936.
>
> CLARENCE W. WILSON
> Foreman."

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed that the plaintiff, Ethel M. Doheny, as administratrix of the Estate of Marguerite Doheny, deceased, have judgment against the defendants, John M. Coverdale and E. O. Johnson co-partners, doing business under the firm name and style of Coverdale & Johnson in the sum of $5,000.00 and that said plaintiff have judgment against said defendants for her costs herein in the sum of $243.26.

(Testimony of Julius G. Hilgard.)

Judgment entered this 4th day of May A. D. 1936.

(Court Seal) GEORGE HARPER
Clerk.
By J. G. HILGARD
Deputy Clerk.

Mr. McCabe: As part of exhibit No. 24, and exhibit No. 13, we offer as part of the exhibits, the return of the Sheriff showing no property was found or located with which to satisfy the execution. [70]

Mr. Toole: Same objection to that.

The Court: Overruled. The executions with the returns are offered in evidence. They are there.

Mr. McCabe: They are annexed to the execution. I want the whole exhibits with the return of the Sheriff received in evidence.

Mr. Toole: The same objection to the return.

The Court: Overruled.

Mr. McCabe: If your Honor please, there were depositions that were taken in this cause.

The Court: Any cross examination?

Mr. Toole: No cross examination.

Witness Excused

Mr. McCabe: If your Honor please, may the record show that the original exhibits named be withdrawn and certified copies substituted, in view

of the fact that they are records of the District Court here?

Mr. Toole: No objection that that.

The Court: It may be done.

Mr. McCabe: If your Honor please, it is stipulated and agreed between the parties hereto that notice of the filing of the deposition of W. O. Whipps was in each case served upon the Attorneys for the defendant after the filing of the depositions in this Court.

The Court: Perhaps you better read it. They are both the same, those depositions. These cases are consolidated. We are only going to read one of the depositions.

Mr. McCabe: Is there any objection made to the notice of taking of the deposition, or as to the affidavit of mailing, or as to the formality in connection with the taking or the execu- [71] tion of the certificate, or that the officer was not duly sworn as stated in the certificate?

Mr. Toole: No objection.

Whereupon the deposition of W. O. Whipps in the case of Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, vs. United States Fidelity and Guaranty Company was read in evidence, as follows:

[Title of Court and Cause.]

DEPOSITION OF W. O. WHIPPS

Examination by Mr. McCabe:

The Witness: My name is W. O. Whipps, residence Helena, Montana. I am employed by the State Highway Commission of the State of Montana in the official capacity of Secretary and Administrative Engineer and was so employed during the months of September to December, inclusive, of 1934. During such months, and in that capacity I had custody of the original files and records of the State Highway Commission of the State of Montana. I have searched, and found and brought with me from the official records a contract entered into between the State Highway Commission of the State of Montana and John M. Coverdale and E. O. Johnson.

Being asked to examine this contract, marked plaintiff's exhibit 1, I am able to identify the signature of O. S. Warden thereon. He was the Chairman of the State Highway Commission on September 21, 1934. I am not able to identify the signatures of John M. Coverdale and E. O. Johnson thereon. I am able to identify the signature of Raymond E. Nagle and being shown that signature designated "By C. J. Dousman, Assistant" I can say that is the handwriting of Mr. Dousman. My attention being directed to the signature thereon "W. O. Whipps," that signature is mine. [72]

I am acquainted with the signature of Don W. Jacobus and the signature on the instrument "Don

(Deposition of W. O. Whipps.)

W. Jacobus" is the signature of Don W. Jacobus. My attention being directed to writing designated "Contract Bond" attached to this document, the signature thereon "Don W. Jacobus" is the signature of Don W. Jacobus.

This document, marked plaintiff's exhibit 1, is the contract held in the custody of the State Highway Commission as the original contract and the bond attached it is the bond being held as the bond executed to the State of Montana as the bond written pursuant to the provisions of the contract.

Mr. McCabe: Offer in evidence plaintiff's exhibit 1 as a part of the testimony of this witness.

Mr. Boone: To which the defendant objects on the ground that the instrument has not been properly identified; further as incompetent, irrelevant and immaterial, having no bearing upon the issues in this case. And the further objection that the offer of the exhibit is an attempt on the part of the plaintiff to vary the terms of a certain policy of insurance, which is the subject of this action.

The Court: Are these standard specifications, and do they relate particularly to this contract?

Mr. McCabe: Yes.

The Court: Overrule the objection.

The Witness: The Contract Bond, marked as plaintiff's exhibit 2, is the bond I have heretofore testified to as being annexed to the document marked plaintiff's exhibit 1.

Mr. McCabe: We offer plaintiff's exhibits 1 and

(Deposition of W. O. Whipps.)

2 as a part of the testimony of the deposition of this witness. [73]

Mr. Boone: To which the defendant objects in that the plaintiff's exhibit has not been properly authenticated and on the further ground that the exhibit is incompetent, irrelevant and immaterial, and has no bearing on the issues in this case; on the further ground it is an attempt on the part of the plaintiff to vary the terms of a certain insurance policy executed to John M. Coverdale and E. O. Johnson, which insurance policy is the subject of this action.

The Court: Overrule the objection.

Whereupon plaintiff's exhibits Nos. 1 and 2, on deposition, were received in evidence and filed with the Clerk of the Court and the material portions of said exhibits are as follows:

PLAINTIFF'S EXHIBIT 1 ON DEPOSITION

STANDARD SPECIFICATIONS

Section 1

Definitions and Terms

1.8 "Surety" The corporate body which is bound with and for the Contractor, who is primary liable, and which engages to be responsible for his payment of all debts pertaining to and for his acceptable performance of the work for which he has contracted.

1.12 "Specifications" The directions, provisions, and requirements contained herein, together with

(Deposition of W. O. Whipps.)

(Plaintiff's Exhibit 1 on Deposition—continued)

all written agreements made or to be made, pertaining to the method and manner of performing the work, or to the quantities and qualities of materials to be furnished under the contract.

1.13 "Contract" The agreement covering the performance of the work, and the furnishing of materials in the construction of same. The contract shall include the accepted "Proposal," [74] "Plans," "Specifications" and "Contract Bond," also any and all supplemental agreements which reasonably could be required to complete the construction of the work in a substantial and acceptable manner.

1.14 "Contract Bond" The approved form of security furnished by the Contractor and his Surety as a guaranty of good faith on the part of the Contractor to execute the work in accordance with the terms of the Contract.

1.15 "Highway" The whole right-of-way which is reserved for use in constructing the roadway and its appurtenances.

1.18 It should be understood thoroughly by all concerned that all things contained herein, together with the "Advertisement for Proposals" or "Notice to Contractors," and the "Contract Bond," as well as any papers attached to or bound with any of the above, also any and all supplemental agreements made or to be made, are hereby made a part of these Specifications and Contract, and are to be considered one instrument. No papers attached to or

(Deposition of W. O. Whipps.)

(Plaintiff's Exhibit 1 on Deposition—continued)

bound with any of the above shall be detached therefrom as all are a necessary part thereof.

Section 3

Award and Execution of Contract

3.4 Contract Bond Required.

The successful bidder, at the time of the execution of the Contract, must deposit, with the Commission, a surety bond for the full amount of the contract. The form of bond shall be that provided by the Commission and the surety shall be acceptable to the Commission. The surety bond must be executed by a surety company authorized by law to transact such business in the State of Montana and attached thereto must be a certificate under the seal of said surety company that [75] a full local agent's commission will be paid by said surety company to a licensed Montana agent of said surety company and that full credit for said bond and bond premiums has been entered upon the books of the Montana Branch office or Montana General Agency of said Surety company, providing said surety company maintains such Branch Office or General Agency.

Section 4

Scope of Work

4.1 Intent of Plans and Specifications.

The Contractor shall do all clearing and grubbing, make all excavations and embankments, do all

(Deposition of W. O. Whipps.)

(Plaintiff's Exhibit 1 on Deposition—continued)

shaping and surfacing, construct all ditches, drainage structures, bridges, and other appertain structures, as indicated in the proposal and on the plans; remove obstructions from within the lines of the highway and shall do such additional, extra and incidental work as may be considered necessary to complete the roadway to the proper lines, grades and cross-sections, in a substantial and workmanlike manner. He shall furnish, unless otherwise provided, all implements, machinery, equipment, tools, material and labor necessary to the prosecution of the work. In short, the Contractor shall construct the improvement in strict accordance with the plans, specifications, special provisions, and contract, and when completed, shall leave it in a neat and finished condition.

4.3 Increased or Decreased Quantities.

The engineer reserves the right to make such alterations in the plans or in the quantities of work as may be considered necessary. Such alterations shall be in writing and shall not be considered as a waiver of any conditions of the contract nor to invalidate any of the provisions thereof, provided that no alteration shall [76] involve an extension or shortening of the length of the project of more than 25 per cent, and provided that a supplemental agreement with the contractor will be necessary when alterations involve (1) an increase or decrease of more than 25 per cent of the total cost of the

(Deposition of W. O. Whipps.)

(Plaintiff's Exhibit 1 on Deposition—continued)

work calculated from the original proposal quantities and the contract unit prices, or (2) an increase of more than 25 per cent in the quantity of any one major contract item, including earth or common roadway excavation but not including excavation of any other class nor items of foundation piling. Alterations involving an increase of more than 25 per cent in the quantity of any one minor contract item will not require a supplemental agreement. Before work shall be started on any alteration requiring such supplemental agreement, the agreement setting forth an equitable adjustment of compensation satisfactory to the contractor shall be executed by the engineer and the contractor. The contractor shall perform the work as increased or decreased.

Section 7

Legal Relations and Responsibility to the Public

7.1 Laws to be Observed.

The Contractor shall at all times observe and comply with all Federal and State laws, and local by-laws, ordinances and regulations in any manner affecting the conduct of the work, and shall indemnify and save harmless the State and all of its officers, agents, and servants against any claim or liability arising from or based on the violation of any such law, by-law, ordinance, regulations, order or decree, whether by himself or his employees.

(Deposition of W. O. Whipps.)

(Plaintiff's Exhibit 1 on Deposition—continued)

7.11 Responsibility for Damage Claims.

The Contractor shall save and keep harmless the State of Montana and any county, [77] city or town thereof against and from all losses to it from any cause whatever growing out of the prosecution of the work. The Engineer may retain from moneys due, or to become due, the Contractor, a sufficient amount to insure the enforcement of the provision.

The Contractor shall carry public liability insurance to indemnify the public for injuries or damages sustained by reason of the carrying on the work. This insurance shall be in the amount of at least $10,000.00 for one person and a total of $20,000.00 for one accident. The Contractor shall submit adequate evidence to the Commission that he has taken out this insurance.

7.13 Contractor's Responsibility for Work.

(a) Until its acceptance by the Engineer, the improvement shall be under the care and charge of the Contractor, and he shall be responsible for and shall repair and make good any injury or damage to the improvement or to any part thereof from any cause whatsoever; except that the Contractor will not be held responsible for injury or damage to the improvement or any part thereof when, in the opinion of the Engineer, such damage is not the result of careless, negligent or dilatory work on the part of the Contractor, but is the result of unforeseen natural causes beyond the control of the Con-

(Deposition of W. O. Whipps.)

(Plaintiff's Exhibit 1 on Deposition—continued)

tractor, such as violent storms, cloudbursts and floods. The judgment of the Engineer in this matter shall be final, and binding upon both parties to the contract. When a Contractor has, through dilatory methods and other causes within his control, exceeded his contract time unjustifiably, and has therefore been denied an extension of his contract time, the saving clause in the next preceding sentence shall not apply, but he shall be responsible for all damages of every nature. [78]

(b) The above saving clause shall not apply to bridge contracts. The Contractor in submitting proposals for such work must be governed by his own judgment as to probable weather and stream conditions and the actual resulting conditions will never be considered as unforeseen, but any loss or damage of any nature prior to acceptance of the improvement by the Engineer shall be the responsibility of the Contractor.

Section 9

Measurement and Payment

9.4 Extra and Force Account Work.

Extra work as hereinbefore described under the sub-heading "Scope of Work," shall be paid for either at agreed unit prices under the provisions of a "Supplemental Agreement," or on a "Force Account" basis, as shall have been agreed by the Engineer and Contractor before starting said work.

(Deposition of W. O. Whipps.)

(Plaintiff's Exhibit 1 on Deposition—continued)

Supplemental Agreement.

When it has been agreed to perform certain extra work not contemplated in the original Proposal and Contract on the basis of agreed prices, a "Supplemental Agreement" will be prepared fully describing said extra work, including the approximate quantity as nearly as may be arrived at in advance of the performance of the work, and the agreed unit prices. This "Supplemental Agreement" shall be executed by both parties to the original contract, shall thereupon be considered a part of the contract, and payment for the work included therein shall be for the actual quantity performed at the agreed unit prices set forth therein. Extra work provided for by a "Supplemental Agreement" shall not be started until after the execution of the said agreement. [79]

NOTICE TO CONTRACTORS

U. S. Public Works Highway Project
No. NRH-176"E", Unit-2 (1935)

Notice is hereby given that sealed bids for the construction of the improvement hereinafter described will be received by the State Highway Commission of Montana at the offices of the said Commission in the Capitol Building at Helena until 9:30 A.M. on Sep. 21, 1934, at which time and place they will be publicly opened and read.

The improvement contemplated consists of the construction of the following described structures

(Deposition of W. O. Whipps.)

(Plaintiff's Exhibit 1 on Deposition—continued)

on Section "E" of the Augusta-Sun River Road in Lewis & Clark County:

1. A 2-span 79′ concrete bridge across the South Fork Sun River.

2. A single panel 19′ treated timber pile trestle.

3. Two standard treated timber stock passes.

4. A 5-panel 95′ treated timber pile trestle bridge across Spring Coulee.

5. A 4-panel 76′ treated timber pile trestle bridge across Dry Creek.

Contract

This Agreement, made in duplicate this 21st day of September A. D. 1934, between the State of Montana, by the State Highway Commission, hereinafter called the party of the first part, and John M. Coverdale and E. O. Johnson, a copartnership, doing business under the firm name of Coverdale & Johnson their heirs, executors, administrators and assigns, party of the second part, hereinafter called the Contractor.

Witnesseth, That the Contractor, for and in consideration of the payment or payments herein specified and agreed to by [80] the party of the first part, hereby covenants and agrees to furnish, and deliver and pay for all the materials, and to furnish all tools, machinery and implements, and to do and perform all the work and labor in the construction or improvement of certain bridges in Lewis & Clark County, State of Montana, U. S. Public Works

(Deposition of W. O. Whipps.)

(Plaintiff's Exhibit 1 on Deposition—continued)

Highway Project No. NRH-176 "E," Unit 2 (1935), according to the dimensions and grades thereof this day agreed upon between the said parties and shown and stated in the plans and specifications hereto annexed, at the unit prices bid by the said Contractor for the respective estimated quantities, aggregating approximately the sum of Fifteen thousand six hundred fifteen and 66/100 Dollars ($15,615.66) and such other items as are mentioned in their original proposal, which proposal and prices named, together with the annexed specifications are made a part of this contract and accepted as such, and also the plans of the improvement prepared by the State Highway Commission, are also agreed by each party as being a part hereof; the said improvement being situated as follows: 1 concrete bridge and 5 treated timber pile trestle bridges and stock passes on the Augusta-Sun River Road in Lewis & Clark County.

It is understood by and between the parties hereto that the work included in this contract is to be done under the direction of the Engineer of the State Highway Commission and that his decision as to the construction and meaning of the drawings and specifications shall be final. It is also understood and agreed by and between the parties hereto that such additional drawings and explanations as may be necessary to detail and illustrate the work to be done are to be furnished by said Engineer, and the

(Deposition of W. O. Whipps.)

(Plaintiff's Exhibit 1 on Deposition—continued)

parties hereto agree to conform to and abide by the same so far as they may be consistent with the [81] purpose and intent of the original drawings and specifications referred to herein. It is further understood that the work shall be subject to inspection at all times and approval by the United States Secretary of Agriculture, or his agents, and shall be performed in accordance with the laws of the State of Montana and the rules and regulations of the said Secretary of Agriculture made pursuant to that certain act of Congress approved July 11, 1916, (39 U. S. Statutes at Large, 335) entitled "An Act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes," and all Acts of Congress supplementary and amendatory thereto.

The contractor further covenants and agrees that all of said work and labor shall be done and performed in the best and most workmanlike manner and that all and every of said materials and labor shall be in strict and entire conformity, in every respect, with the said specifications and plans and shall be subject to the inspection and approval of the Engineer of the State Highway Commission, or his duly authorized assistant, and, in case any of said materials or labor shall be rejected by the said Engineer, or his assistant, as defective or unsuitable, then the said materials shall be removed and replaced with other approved materials and the said

(Deposition of W. O. Whipps.)

(Plaintiff's Exhibit 1 on Deposition—continued)

labor shall be done anew, to the satisfaction and approval of the said Engineer, or his assistant, at the cost and expense of the contractor.

The contractor further covenants and agrees that he will well and truly pay all laborers, mechanics, subcontractors and material men who perform work or furnish material under this contract, and all persons who shall supply him and or the subcontractors with provisions, provender and supplies for the carrying on of the work. [82]

The contractor further covenants and agrees that he will begin the actual performance of the work required and contemplated under this agreement within ten days after the date of the execution of this contract and that all and every of the said materials shall be furnished and delivered and all and every of the said labor shall be done and performed in every respect to the satisfaction and approval of the engineer aforesaid on or before APRIL 30, 1935. It is expressly understood and agreed that in case of the failure on the part of the contractor, for any reason, except with the written consent of the State Highway Commission, to complete the furnishing and delivery of the said material and the doing and performance of said work on or before APRIL 30, 1935, the party of the first part shall have the right to deduct from any moneys due the contractor, or if no moneys shall be due, the party of the first part shall have the right to

(Deposition of W. O. Whipps.)

(Plaintiff's Exhibit 1 on Deposition—continued)

rceover the amount of Twenty-five and no/100 Dollars ($25.00) per day, as fixed, agreed and liquidated damages, for each and every calendar day elapsing between the date above stipulated for completion and the actual date of completion and final acceptance; this in accordance with the paragraph of the Standard Specifications hereto annexed which refers to "Failure to Complete the Work on Time." Provided, however, that upon receipt of written notice from the contractor of the existence of causes over which said contractor has no control and which must delay the completion of the said work, the State Highway Commission may, at its discretion, extend the period hereinbefore specified for the completion of the said work, and in such case the contractor shall become liable for said liquidated damages for delays commencing from the date on which said extended period shall expire. [83]

The contractor further covenants and agrees that he will without further expense to the party of the first part, remove all surplus soil and rubbish from off the said land and leave the said road and parts of the land or field adjoining it affected by such work, in the proper state, order and condition.

It is expressly understood and agreed that if the contractor fails to comply with any of the requirements of the plans or specifications, or shall discontinue the prosecution of the work, or if the con-

(Deposition of W. O. Whipps.)

(Plaintiff's Exhibit 1 on Deposition—continued)

tractor shall become insolvent or bankrupt, or commit any act of bankruptcy or insolvency, or allow any final judgment to stand against him unsatisfied for a period of forty-eight (48) hours, or shall make an assignment for the benefit of creditors, or from any other cause whatsoever shall not carry on the work in an acceptable manner, the Engineer shall give notice in writing to the contractor and his surety of such delay, neglect or default, specifying the same, and if the contractor within a period of three (3) days after such notice shall not proceed in accordance therewith, then the Commission shall, upon written certificate from the Engineer of the fact of such delay, neglect or default and the contractor's failure to comply with such notice, have full power and authority, without violating the contract, to take the prosecution of the work out of the hands of said contractor, to appropriate or use any or all materials and equipment on the ground as may be suitable and acceptable and may enter into an agreement with any other person or persons for the completion of said contract according to the terms and provisions thereof, or use such other methods as it may deem expedient for the completion of said contract in the specified manner. All costs and charges incurred by the Commission, together with the costs of completing the [84] work under contract, shall be deducted from any moneys due or which may become due said contractor. In case the

(Deposition of W. O. Whipps.)

(Plaintiff's Exhibit 1 on Deposition—continued)

expense so incurred by the Commission shall be less than the sum which would have been payable under the contract, if it had been completed by said contractor, then the said contractor shall be entitled to receive the difference; and in case such expense shall exceed the sum which would have been payable under the contract, then the contractor and the surety shall be liable and shall pay to the state the amount of said excess.

It is expressly understood and agreed that no claim for extra work or materials, not specifically herein provided, done or furnished by the contractor, will be allowed by the State Highway Commission, nor shall the contractor do any work or furnish any materials not covered by these specifications and contract unless such work is ordered in writing by the Engineer. In no event shall the contractor incur any liability by reason of any verbal directions or instructions that he may be given by the said engineer, or his authorized assistant; nor will the said party of the first part be liable for any extra materials furnished or used, or for any extra work or labor done, unless said materials, work or labor are required by said contractor on written order furnished by the said engineer. Any such extra work or materials which may be done or furnished by the contractor without such written order first being given shall be at said contractor's own risk, cost and expense, and he hereby covenants

(Deposition of W. O. Whipps.)

(Plaintiff's Exhibit 1 on Deposition—continued)

and agrees that without such written order he shall make no claim for compensation for work or materials so done or furnished.

The contractor further covenants and agrees that during the progress of the work to be performed under the provisions [85] of this contract, he will in every respect comply with the provisions of the Workmen's Compensation Act, being Chapter 96 of the Session Laws of the 14th Legislative Assembly of the State of Montana, and with all statutory provisions supplementary or amendatory thereto.

In case any question or dispute arises between the parties hereto respecting any matter pertaining to this contract, or any part thereof, said questions or disputes shall be referred to the State Highway Commission and Attorney General of the State of Montana, whose decisions shall be final, binding and conclusive upon all parties without exception or appeal; and all right or rights, of any action at law, or in equity, under and by virtue of this contract, and all matters connected with it and relative thereto are hereby expressly waived by the contractor.

It is expressly understood and agreed that the contractor will notify the State Highway Commission in writing of the date upon which his work will be completed and ready for final inspection; that upon receipt of such notice from the contractor the engineer will arrange for a final inspection of

(Deposition of W. O. Whipps.)

(Plaintiff's Exhibit 1 on Deposition—continued)

the work, such inspection to be had within fifteen days of the date specified in such notice from the contractor; that final payment for the work will be made within ninety days of the date of the final acceptance of the project by the engineer.

The contractor further agrees that he will save and keep harmless the said State of Montana against and from all losses to it from any cause whatever, including patent trade mark and copyright infringements in the manner of constructing such section of roadway. [86]

The contractor hereby further agrees to receive the following prices as full compensation for furnishing all the materials and labor which may be required in the prosecution and completion of the whole of the work to be done under this contract or agreement, and in all respects to complete said contract to the satisfaction of the State Highway Commission; it being understood and agreed by and between the parties hereto that ninety per cent (90%) of the amount due for the completion of work during any working month, exclusive of "extra work" and "extra materials," when and only when such amount is in excess of five hundred dollars ($500.00) shall be paid to the contractor by the party of the first part within thirty days after the expiration of that working month, and all unpaid balances due on the final estimate shall be paid similarly to the contractor within ninety days

(Deposition of W. O. Whipps.)

(Plaintiff's Exhibit 1 on Deposition—continued)

after the final acceptance of the contract, as provided in the second paragraph supra; the estimate in all cases of the work completed during any working month as well as the final estimate, to be prepared by the engineer of the State Highway Commission or his authorized assistant.

(Here refer to schedule of bid prices submitted by contractor with his Proposal Form, which schedule and Proposal Form are inserted and, by agreement of both parties, are made a part of the Contract.)

It is expressly understood and agreed by and between the parties hereto that as a condition precedent to the complete execution of this contract, the contractor will furnish a good and sufficient surety bond in the amount of Fifteen thousand six hundred fifteen and 66/100 Dollars ($15,615.66) to be conditioned upon the faithful performance of the covenants and agreements as herein set forth by him to be performed, subject [87] to the approval by the Chairman of the State Highway Commission and the Attorney General of the State of Montana.

In witness whereof, the Chairman of the State Highway Commission, by authority in him vested, has hereunto subscribed his name on behalf of the State of Montana and affixed the seal of the State Highway Commission, hereto, and the said—Cover-

(Deposition of W. O. Whipps.)

(Plaintiff's Exhibit 1 on Deposition—continued)

dale & Johnson—hereunto set their hands and seal, the day and year first above written:

STATE OF MONTANA,
By O. S. WARDEN
Chairman of the State Highway Commission.

[Seal of State Highway Commission]

Attest:

W. O. WHIPPS
Secretary.

[Seal] COVERDALE & JOHNSON
[Seal] By JOHN M. COVERDALE
[Seal] By E. O. JOHNSON
Witnesses: KATHERINE L. COVERDALE
DON W. JACOBUS

Approved as to form and legality:
RAYMOND T. NAGLE
Attorney General.
By C. J. DOUSMAN
Assistant

PLAINTIFF'S EXHIBIT 2 ON DEPOSITION

CONTRACT BOND

(Revised February, 1931)

Know all men by these presents, That we, John M. Coverdale and E. O. Johnson, a co-partnership, doing business under the firm name of—Coverdale

(Deposition of W. O. Whipps.)

& Johnson—hereinafter called the "Principal" and United States Fidelity and Guaranty Company, a corporation licensed under the laws of the State of Montana, hereinafter called the "Surety" are held and firmly bound unto the State of Montana in the full and just sum of Fifteen thousand [88] six hundred fifteen and 66/100 Dollars ($15,615.66) lawful money of the United States of America, to be paid to the State of Montana, or its assigns, to which payment well and truly to be made and done, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our respective seals and dated this Twenty-first day of September, 1934.

Whereas, the above bounden "Principal" has entered into a contract with the State of Montana, by the State Highway Commission, through its Chairman, bearing even date herewith, for the improvement construction of certain section of bridges in Lewis & Clark County, State of Montana, U. S. Public Works Highway Project No. NRH-176 E, U 2 (1935) for approximately the sum of Fifteen thousand six hundred fifteen and 66/100 Dollars ($15,615.66) the said bridges being situated as follows: 1 concrete and 5 treated timber pile trestle bridges and stock passes on the Augusta-Sun River Road in Lewis & Clark County, and

Whereas, It was one of the conditions of the award of the State Highway Commission, acting for

(Deposition of W. O. Whipps.)

and on behalf of the State of Montana, pursuant to which said contract was entered into, that these presents should be executed:

Now, Therefore, The condition of this obligation is such that if the above bonded "Principal" as Contractor shall in all respects faithfully perform all of the provisions of said contract, and his, their or its obligations thereunder including the specifications therein referred to and made part thereof and such alterations as may be made in said specifications as therein provided for, and shall well and truly, and in a manner [89] satisfactory to the State Highway Commission, complete the work contracted for, and shall save harmless the State of Montana, from any expense incurred through the failure of said Contractor to complete the work as specified, or from any damages growing out of the carelessness of said Contractor or his, their, or its servants, or from any liability for payment of wages due or material furnished said Contractor, and shall well and truly pay all laborers, mechanics, subcontractors and material men who perform work or furnish material under such contract, and all persons who shall supply him or the subcontractor with provisions, provender and supplies for the carrying on of the work, and also shall save and keep harmless the said State of Montana against and from all losses to it from any cause whatever including patent, trade-mark and copyright infringements, in the manner of constructing said section

(Deposition of W. O. Whipps.)

of work, then this obligation to be void or otherwise to be and remain in full force and virtue.

[Seal] COVERDALE & JOHNSON
[Seal] By JOHN M. COVERDALE
[Seal] By E. O. JOHNSON

Witnesses:
KATHERINE L. COVERDALE
DON W. JACOBUS

UNITED STATES FIDELITY AND GUARANTY COMPANY
Surety Company
By DON W. JACOBUS
Its Attorney in Fact.

Approved as to form and legality:
RAYMOND T. NAGLE
Attorney General.
by C. J. DOUSMAN [90]

(Deposition of W. O. Whipps.)

Office of the State Auditor
Insurance Department

U. S. Fidelity & Guaranty Co. is duly licensed to do business in the State of Montana.

Don W. Jacobus is a duly licensed Agent for the above named company.

Don W. Jacobus is the duly authorized Attorney-in-Fact with powers to execute bonds for aforesaid Company in unlimited amounts.

JOHN J. HOLMES
State Auditor and
Commissioner of Ins.
By J. D. KELLEY
F. THOMAS

Date 10/1/34

State of Montana,
County of Lewis and Clark—ss.

Don W. Jacobus, being first duly sworn, deposes and says that he is the Manager of the Montana Branch Office of the United States Fidelity and Guaranty Company of Baltimore, residing in Helena, that he as Attorney-in-fact of said surety company has executed the attached bond on behalf of John M. Coverdale and E. O. Johnson, a copartnership, doing business under the firm name of Coverdale & Johnson of Anaconda and Helena, Montana, running to the State of Montana and covering the construction of U. S. Public Works Highway

(Deposition of W. O. Whipps.)

Project NRH-176 "E" Unit 2 (1935); that the full agent's commission on the said bond will be paid by the United States Fidelity and Guaranty Company to a licensed agent of the said United States Fidelity and Guaranty Company and that the bond and premium therefor has been entered upon the books of the Montana Branch Office of the [91] said United States Fidelity and Guaranty Company.

DON W. JACOBUS

Subscribed and sworn to before me this 1st day of October, 1934.

L. ALBRECHT

Notary Public for the State of Montana.
Residing at Helena, Montana.

My commission expires December 15th, 1934.

The Witness: The documents, plaintiff's exhibits 1 and 2, are not the only documents of that character in connection with any contract between Coverdale and Johnson and the State Highway Commission which I have in the official files and records of the commission as I think they had another contract, but not on this project. This contract is a contract connected with a U. S. Public Works Highway Project in the State of Montana known as Project NRH-176 "E", Unit 2 (1935).

After plaintiff's exhibit 1 was signed in duplicate, one original was delivered to the contractor

(Deposition of W. O. Whipps.)

and the other kept by the State Highway Commission.

Q. Upon delivering of the contract to the contractor does, or did the Commission at the time the present contract bears date, require any evidence of the issuance of a public liability policy applicable to the work embraced in that contract?

Mr. Boone: Objected to as leading; on the further grounds as incompetent, irrelevant and immaterial, and calls for a conclusion of the witness, and on the further ground that the contract document speaks for itself and is the best evidence.

The Court: I will overrule the objection.

A. Yes.

Q. What did the Commission require at that time in the way of a written communication showing the issuance of such a [92] policy?

Mr. Boone: Objected to as immaterial, no proper foundation having been laid; there being no showing there was any transaction between the State Highway Commission and the defendant in this action, and in this the requirements of the State Highway Commission will not be binding upon the defendant.

The Court: I will overrule the question.

Q. What?

Mr. Boone: Same objection as to question as amended.

The Court: I will overrule objection.

(Deposition of W. O. Whipps.)

A. The standard specifications attached to a form, a part of the contract, include RO 7.11, require the contractor to carry public liability insurance in the amount of at least Ten Thousand Dollars for one person, and a total of Twenty Thousand for one action. At the time that the contract was sent to Coverdale and Johnson for execution a letter was written transmitting said contract and reminding the contractor of Article 7.11 requesting that the Highway Commission be informed of the fact that the required public liability insurance policy will be obtained.

Mr. Boone: Defendant moves to strike out the answer of the witness on the ground that it is not responsive, and on the further ground that the contract document introduced as plaintiff's exhibit 1 speaks for itself, and on the further ground that any communications between the State Highway Commission and Coverdale and Johnson, the contracting party, are not binding upon the defendant in this action.

Mr. McCabe: The purpose of this line of examination is to show what particular kind of evidence they request, and to show that it was furnished at the request of the defendant [93] company.

Mr. Toole: I do think that in view of counsel's statement the defense should make a statement. As to these documents in these depositions, there have been two references made. One to the bond, and another to an insurance policy, without discrimina-

(Deposition of W. O. Whipps.)

tion or distinction. The bond referred to is the completion bond of the contractor. I don't think your Honor, when you read the pleadings, will be able to determine perhaps whether counsel relies upon his right to recover under the completion bond, and completion of the job, or the public liability insurance policy. I want to state to the Court that it is true that the contract contains the clause referred to by the plaintiff in this action. It contains the clause which requires in the specifications that the contractor shall furnish a public liability insurance policy. It is quite different and distinct from the completion bond. It does not say, however, as to what the terms of that policy shall be. Plaintiff in this action has alleged that the public liability policy was furnished, and the pleadings in this case go upon the theory that the contract between the State Highway Commission and Coverdale and Johnson must be construed together with the public liability policy, and the defense in this action is that is not the law. That is why this objection was made. The provisions of the statute must be construed together with the contract, so that your Honor will understand, there is no law as we view it which requires the Court to construe the contract between Coverdale and Johnson and the State Highway Commission jointly, and together with the public liability policy, but that the policy will stand upon its own terms, and that any evidence of any kind offered for the purpose of altering the contract

(Deposition of W. O. Whipps.)

is a [94] proposal to vary the terms of a written contract by parole evidence, without having shown that it was ambiguous or without having laid a foundation for the receipt of it.

The Court: Well, you may develop your theory. Go ahead. What was that objection now?

Mr. McCabe: "At the time that the contract was sent to Coverdale & Johnson for execution a letter was written transmitting said contract and reminding the contractor of Article 7.11 requesting that the Highway Commission be informed of the fact that the required public liability insurance policy will be obtained."

Mr. Boone: Defendant moves to strike out the answer of the witness on the ground that it is not responsive, and on the further ground that the contract document introduced as plaintiff's exhibit 1 speaks for itself, and on the further ground that any communications between the State Highway Commission and Coverdale & Johnson, the contracting party, are not binding upon the defendant in this action.

The Court: It may not be binding upon the defendant in this action, but it is illustrative, and it may have a bearing on the issues in the case. I will overrule the objection.

The Witness: One of my official duties during the months of September to December, inclusive, 1934, was the handling of correspondence and writing letters on behalf of the Commission and

(Deposition of W. O. Whipps.)

when plaintiff's exhibit 1 was sent to Coverdale & Johnson by mail, a letter from me as Secretary or Administrative Engineer of the Commission accompanied it. The original letter was never returned to the Commission by Coverdale & Johnson. Being shown a document marked plaintiff's exhibit 3, I am able to identify it as a carbon copy of the letter sent to Coverdale & Johnson [95] accompanying the contract and it is one of the official records of the State Highway Commission.

Mr. McCabe: Plaintiff's exhibit No. 3 is offered in evidence.

Mr. Boone: To which the defendant objects on the ground that it is incompetent, irrelevant and immaterial; that the exhibit constitutes a self-serving declaration and on the further ground that no communications, such as plaintiff's exhibit 3, between State Highway Commission and Coverdale & Johnson are binding upon the defendant, and upon the further ground no proper foundation has been laid for the introduction of the exhibit.

The Court: Overrule the objection.

Thereupon plaintiff's exhibit 3, on deposition, was received in evidence over the objection of the defendant and was filed with the Clerk of the Court and said exhibit is as follows:

(Deposition of W. O. Whipps.)

PLAINTIFF'S EXHIBIT 3 ON DEPOSITION

September 26, 1934

USPWH Projects NRH-176 E, U 2 (1935)
and NRH-275 A, Unit 2 (1935)

Coverdale & Johnson,
c/o John M. Coverdale,
416 West Park Avenue,
Anaconda, Montana.

Gentlemen:

There are enclosed herewith two original numbers and two copies of your contracts for U. S. Public Works Highway Projects NRH-176 E, Unit 2 (1935) and NRH-275-A, Unit 2 (1935). In connection with each contract, please have the two originals of the contract and contract bond executed by both members of your firm, signing on the lines checked and having your signature witnessed by two persons. In each case, have the two originals of the [96] contract bond executed by your surety company. Then return the two originals for each project to this office for execution by the Chairman of the Highway Commission. Your original numbers will be returned to you after final execution and approval.

In furnishing your surety bonds, the requirement set forth in Paragraph 3.4, page 4, of the Standard Specifications included in these contracts must be fully complied with, and the certificate referred to

(Deposition of W. O. Whipps.)

must be attached to the Highway Commission's original copy of the bond, which bond is bound in at the back of the contracts.

The copy of the contract marked for the contractor in each case is being furnished in accordance with Article 5.5 of the Standard Specifications. In conformity with this Article, it is expected that the contractor shall keep this copy continuously on the job. The second copy of the contract for each project is intended for the files of your bonding company.

You are reminded of the clause, which is included in Article 7.11, Page 11, Section 7 of the Standard Specifications, providing that you shall carry public liability insurance. The Commission has ruled that no payment on account of these contracts will be made until this office has been furnished with satisfactory information to the effect that this insurance has been taken out by you. Preferably, this information should be conveyed in the form of a letter to this department from the insurance agent who furnishes you the policy. Until this provision is complied with no payment can be made under the contracts.

Very truly yours,

STATE HIGHWAY COMMISSION

By W. O. WHIPPS

Administrative Engineer

W-mo

Encls. [97]

(Deposition of W. O. Whipps.)

The Witness: Being asked to examine the document, marked plaintiff's exhibit 4, I am able to identify it as one of the official records of the Montana Highway Commission which was delivered to the Commission by an agent of the company. I am also able to identify the signature of L. K. Albrecht thereon. L. K. Albrecht is the Assistant Manager under Don W. Jacobus, Manager of the United States Fidelity and Guaranty Company in the Helena Branch office. The red pencil marks in writing and figures thereon were not on the document when it was received by the Commission but were put on at the time of its receipt. These red pencil marks show that the document was received October 1, 1934, and was checked as having been noted by me through the placing of my initials thereon and that said document was marked filed by me, all in accordance with the practice in the office of the State Highway Commission.

As Secretary of the State Highway Commission I have had dealings and communications back and forth with the United States Fidelity and Guaranty Company through Don W. Jacobus, Manager, and L. K. Albrecht, Assistant Manager.

Mr. McCabe: Plaintiff's exhibit 4 is offered in evidence.

Mr. Boone: This is objected to on the ground the instrument has not been properly authenticated; on the further ground no proper foundation has been laid for the admission of the exhibit in evi-

(Deposition of W. O. Whipps.)

dence and on the further ground it is incompetent, irrelevant and immaterial, not serving or having any bearing on the issues in this case.

The Court: Objection overruled.

Thereupon plaintiff's exhibit No. 4, on deposition, was received in evidence over the objection of the defendant and was filed with the Clerk of the Court and said exhibit is as [98] follows:

PLAINTIFF'S EXHIBIT 4 ON DEPOSITION

United States Fidelity and Guaranty Company
Helena Branch Office

In Replying to this Letter Telephone 243
Please Refer to File No.....

Don W. Jacobus, Manager
Suite 27, Union Bank Building
Helena, Mont.

Received 10/1/34
WOW-10/1
Oct. 1, 1934

Attention: Mr. Whipps
Montana State Highway Commission
Helena, Montana

Dear Sir:

Re: Coverdale & Johnson—NRH-275 "A"
Unit 2—$5,270.32
Coverdale & Johnson—NRH-176 "E"
Unit 2—$15,115.66

I have executed and herewith enclose bonds covering the above captioned contracts.

(Deposition of W. O. Whipps.)

For your information, wish to advise that we have issued Contractor's Public Liability Policy PC-19715 for this assured, with Public Liability limits Ten Thousand and Twenty Thousand and Property Damage One Thousand. This policy is written for one year from October 1st, 1934.

Yours very truly,
DON W. JACOBUS
Manager
By (s) L. K. ALBRECHT
Assistant Manager

LA:C

Q. Mr. Whipps, do you know whether the Contractor's Public Liability Policy referred to in the writing plaintiff's exhibit 4 was ever delivered to the State Highway Commission? [99]

A. Yes.

Q. Was such policy ever delivered to the State Highway Commission?

Mr. Boone: Objected to as incompetent, irrelevant and immaterial and leading.

The Court: Objection overruled.

A. No.

Q. Are you able to say whether or not a copy of the Contractor's Public Liability Policy mentioned in plaintiff's exhibit 4 was ever delivered to the State Highway Commission? A. Yes.

Q. Was a copy of such policy ever delivered to the State Highway Commission?

(Deposition of W. O. Whipps.)

Mr. Boone: Same objection.

The Court: Same ruling.

A. No.

Cross Examination

By Mr. Boone:

The Witness: As a matter of fact the State Highway Commission has never required of any contractor on any project to deliver to the Commission either the original policy or a copy and that was true in the case of the contract between the State Highway Commission and Coverdale & Johnson. It has never been the requirement of the State Highway Commission that any contractor, including Coverdale & Johnson, deliver to the Commission the original policy taken out or a copy of the policy of insurance.

I have been Secretary and Administrative Engineer of the State Highway Commission since 1925 and in that capacity I am familiar with the various contracts entered into between the [100] State Highway Commission and various contractors for construction projects in the State of Montana. My attention being called to paragraph 7.11 of the Standard Specifications of the contract between the State Highway Commission and Coverdale & Johnson, and particularly to the second part of that paragraph, I will say that that provision has been a standard provision in all contracts between the State Highway Commission and various contractors since 1929. The State Highway Commission, since

(Deposition of W. O. Whipps.)

1929, has never prepared or had prepared a form of Public Liability Insurance Policy for use by contractors under such contracts and the Commission has never prescribed the terms of the form of such policies to be executed under such standard provision as paragraph 7.11 of the Standard Specifications. The Commission has never prescribed the terms and conditions of such policies except in so far as the Standard Specifications referred to says "Public Liability Insurance."

I have never examined the Contractor's Public Liability Insurance Policy which was executed by the United States Fidelity and Guaranty Company under the terms of this particular contract and I have no knowledge or information as to whether or not such policy is a standard contractor's public liability insurance policy.

Mr. McCabe: That is all of that deposition. Now, the other deposition is the same. I presume it may be stipulated that the objections appearing therein may be considered by the Court on reading the said deposition.

Mr. Toole: It is agreeable to the defendant that it may be so considered, that the rulings may be the same in the second deposition.

The Court: Very well. [101]

Whereupon

HARRY DOHENY,

a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination

By Mr. McCabe:

The Witness: My name is Harry W. Doheny, residence Augusta, Montana. I resided there in December, 1934. I am familiar with the location of the public highway known as the Augusta-Sun River Highway in Lewis and Clark County, Montana, and I am also familiar, and was in December, 1934, with the public highway known as Augusta-Great Falls Public Highway. The Augusta-Sun River Highway is a part of the Great Falls-Sun River Highway, constituting together the Augusta-Great Falls Public Highway.

In December, 1934, I was the father of Marguerite Doheny and Roberta Doheny. Neither was employed in that month by the State of Montana and neither was then employed by the copartnership of Coverdale & Johnson, consisting of John M. Coverdale and E. O. Johnson. At that time Marguerite Doheny was employed at the Randall Hotel in Augusta. Roberta was not employed at that time; she was living at home.

Cross Examination

By Mr. Toole:

The Witness: The highway I have referred to is the highway that runs from Great Falls out to the

(Testimony of Harry Doheny.)

west towards Augusta. It runs pretty much directly from Great Falls to Augusta—pretty nearly west with winding roads here and there—slight winding roads. It is the main highway between Great Falls and Augusta and is a continuous highway. It is fifty-two miles from Great Falls to Augusta. The town of Simms is located about 25 miles, I think, 24 or 25 miles this side of Augusta, between [102] Augusta and Great Falls. Simms is about 25 miles from Augusta and about the same distance from Great Falls.

I am familiar with the location of the place where Coverdale and Johnson were building their bridges in 1934. They were at various points on that highway. The nearest one, I think, to Augusta was about two miles east from Augusta, toward Great Falls.

Q. That is the bridges were in the vicinity of Augusta, were they?

A. They varied along the road. I don't know just how many bridges they built. I know it extended for some miles down that road.

The Witness: The nearest one was about two miles from Augusta. There is a cross road running up through there that comes from Wolf Creek through Augusta and continues on to Choteau. I do not know whether Coverdale and Johnson were building some bridges on that road too at that time.

(Testimony of Harry Doheny.)

Redirect Examination

By Mr. McCabe:

The Witness: The Great Falls-Augusta road runs just on the side of the town of Simms.

Witness Excused.

Whereupon

MRS. ETHEL M. DOHENY,

a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination

By Mr. McCabe:

The Witness: My name is Ethel M. Doheny. I am the plaintiff in these two actions now being tried in this Court. I am the same Ethel M. Doheny who was the plaintiff in the two actions instituted by me in the District Court of Cascade County, Montana, [103] against Coverdale and Johnson, as Administratrix of the Estate of Marguerite Doheny and as Administratrix of the Estate of Roberta M. Doheny. I reside in Augusta, Montana, and resided there in the month of December, 1934. In that month I was acquainted with Roberta Doheny and Marguerite Doheny as I was their mother. I retained you to act as my attorney in the trial of those cases in the District Court of Cascade County, Montana, and after those cases went to judgment I authorized you to take steps to collect those judgments. I further authorized you to investigate to determine whether

(Testimony of Ethel M. Doheny.)

there was any public liability insurance written covering the work of Coverdale and Johnson on the public highway between Sun River and Augusta. I also instructed you to obtain payment of the judgment from the United States Fidelity and Guaranty Company. Neither of these judgments nor any part of them which I obtained in the District Court of Cascade County, Montana, the record of which I have introduced in evidence, has ever been paid. I have never assigned these judgments, or either of them, or any part of them, nor have I in any manner transferred or disposed of those judgments.

In December, 1934, Marguerite and Roberta Doheny were living at home. Marguerite was working at that time at the Randall Hotel. Roberta was not employed. At no time during the month of December were Marguerite or Roberta Doheny employed by Coverdale & Johnson, a co-partnership consisting of John M. Coverdale and E. O. Johnson, or by the State of Montana.

Mr. Toole: I have no cross examination of this witness, but while the witness is on the stand, counsel for plaintiff in this action requested us to produce the public liability policy herein issued. At the time the request was made we were unable [104] to do so because it was in the possession of Coverdale. We now have it and we now hand it to counsel. The original public liability policy written by the defendant United States Fidelity and Guaranty Company, which is in issue in this action.

Witness Excused

Whereupon

E. J. McCABE

was sworn as a witness on behalf of the plaintiff and testified as follows:

The Witness: My name is E. J. McCabe. I am the Attorney for the plaintiff Ethel M. Doheny, Administratrix of the Estates of Marguerite Doheny, Deceased, and Roberta Doheny, Deceased, in the present actions being tried. I also represented the same plaintiff in two cases filed and tried, and entered in judgments in the District Court of Cascade County, Montana. In the spring of 1936, I believe it was May, I think May of 1936, as such Attorney, and before instituting these actions, I wrote the United States Fidelity and Guaranty Company a letter requesting that I be furnished with a copy of the public liability insurance written on Coverdale & Johnson in connection with the projects and in connection with the state contract which has been offered and received in evidence. I have attempted to locate that letter in my file, but I don't find it, but it was merely a request for that policy. I have lost the letter. In response to that I received a letter which is marked defendant's exhibit No. 26. This was received by me from the postoffice in the United States mail at Great Falls, Montana, and refers to that letter which I had written to them, and in which letter they enclosed a copy of the daily reports.

Mr. Toole: Do you offer it?

(Testimony of E. J. McCabe.)

Mr. McCabe: I now offer it in evidence. [105]

Mr. Toole: Objected to in the first place because counsel has not pleaded that he received, or that he requested the report, the daily report, it is not an issue in this case; it is not material. Upon the face of it it shows that it is secondary evidence, in that it is a photostatic copy. It is a photostatic copy of the policy which is now in counsel's possession, and to introduce this at this time would be to encumber the record, and would not be within the issues or the pleadings. I don't think it is particularly material, your Honor, excepting that it is merely a daily report, and is not the policy which is pleaded in this case. Counsel now has the policy.

The Court: I will let it go in evidence. The objection is overruled.

Thereupon

PLAINTIFF'S EXHIBIT No. 26

was received in evidence over the objection of the defendant, said exhibit being a photostatic copy of the daily report of United States Fidelity and Guaranty Company as to the issuance by said company of Contractors' Public Liability Policy No. PC-19715 and letter attached thereto from Thomas A. Hays, Superintendent Casualty Division United States Fidelity and Guaranty Company, to Mr. E. J. McCabe, Attorney, which letter is as follows:

United States Fidelity and Guaranty Company
Baltimore, Maryland

Claim Department

Hugh D. Combs
Vice President

August 4, 1937

Casualty Division
Thomas A. Hays
Superintendent [106]

Mr. E. J. McCabe, Atty.
Strain Building
Great Falls, Montana

Re: Coverdale and Johnson

Dear Sir:

In reply to your letter of July 31, you are advised that it is not possible for us to give you an exact copy of the policy which was issued in this case. The original should be in the possession of Coverdale and Johnson to whom it was issued.

We have, however, the daily report and copies of the nine endorsements which are attached to said daily report. In order to comply with your request as far as possible, we are attaching photostatic copies of both sides of said daily report and endorsements. The daily report should contain all the information set forth on the policy.

We assume you have been unsuccessful in your request to Coverdale and Johnson for a copy of the policy itself. We are always loath, for the reasons stated in our communication of July 29, to furnish copies to third parties. Because we do not see how

(Testimony of E. J. McCabe.)

we would prejudice the interest of our insured in this case, we are complying with your request.

Yours very truly,

THOS. A. HAYS

Superintendent

TAH:LWK

Witness (Continuing): After the trial of the action in the District Court in Cascade County, Montana, the two actions to which I have referred, and when the jury went out to consider of their verdict, I spoke to Mr. Coverdale, John M. Coverdale, who is present in Court, and in connection with the cases, and he said,—— [107]

Mr. Toole: We object to any statement made by Mr. Coverdale as not a part of this action. He cannot make any statements which could be binding upon the defendant.

The Court: He may answer.

Witness (Continuing): Mr. Coverdale stated, if you obtain any judgment in these cases I have not any money to pay. They won't be any good. I have no money to pay them with.

Mr. Toole: That is all objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Witness (Continuing): After he made certain statements, I said to him, well, cannot I examine the public liability policy that was issued under

(Testimony of E. J. McCabe.)

your contract with the Highway Commission. He said, I don't have it, it is lost, but I will go back to Anaconda, and when I get there, if I can find it, I will sent it to you, or a copy. After that I never heard anything from Mr. Coverdale. So after the judgments obtained in the state court were affirmed by the Supreme Court I talked with Don W. Jacobus, the Manager of the United States Fidelity and Guaranty Company at Helena, in his office. I believe it was in the Union Bank & Trust Company Building in Helena. At that time I stated that I represented Mrs. Doheny and requested that his company pay the judgments obtained in the state court and which had been affirmed by the Supreme Court of the State of Montana. He thereupon said, in reply, we will not pay a cent on the judgments.

Mr. Toole: Now, we move that that be stricken as it not having been shown that Don W. Jacobus has any right of any kind or character to bind the United States Fidelity and Guaranty Company, because he could not refuse under any circumstances to pay claims that the company was properly obligated to pay. [108]

The Court: Was he the Manager of the Company in Montana?

Mr. Toole: I further object on the ground that it has not been shown that he was qualified; that he was qualified to make any statement to vary the terms of a written contract.

(Testimony of E. J. McCabe.)

The Court: I will let the witness answer as to what the Manager said.

A. I went to the office, and on the door of the office was United States Fidelity and Guaranty Company, and printed on it Don W. Jacobus, Manager. That was on the office, on the glass. I went into that office. I asked for the Manager, and Mr. Jacobus, whom I have known for a number of years, appeared and said, what do you want? I requested that he pay the judgments. He thereupon stated, we will not pay another cent on those. Our Attorneys conducted the defense in the state court; we had to pay them, and we had to pay the expenses of the defense of the case in the state court, and also on appeal.

Mr. Toole: I move that all that be stricken as immaterial; not binding upon the United States Fidelity and Guaranty Company.

The Court: I think it is material. I intend to let you state what he said with reference to showing his attitude as far as he represented the company, the attitude of the company, so far as he went in respect to paying these claims. Whether he paid the other expenses or not.

Mr. Toole: Note an exception.

Witness (Continuing): I, as Attorney for the plaintiff, obtained the issuance of the executions that were issued in the two cases which have been introduced as exhibits in this hearing, and personally presented them to the Sheriff of Deer Lodge

(Testimony of E. J. McCabe.)

County, at Anaconda, requesting him to execute the judgments against the property of Coverdale & Johnson, co-partnership, [109] and John M. Coverdale.

Cross Examination

By Mr. Toole:

The Witness: I have not looked at the policy that you just gave me. What I would not like to have done here is to have the policy introduced. I don't think it is any use to introduce it. You have admitted the issuance of the policy. We have introduced the policy that was given to us. It is up to you to introduce the policy. We are not relying upon the policy. We are relying upon the obligation of the company, that the company assumed both under its bond and under the contract, or under any policy that has been written. In other words, they have refused to give us access to the policy. I know as a matter of fact that it is the practice when a public liability policy is issued, that it is delivered by the company to the assured. And I know that in this case, by being informed by Coverdale, a public liability policy issued by the United States Fidelity and Guaranty Company was delivered to Coverdale & Johnson. I think I learned that while the Coverdale cases were being tried. I don't recall whether I had written you a letter discussing this policy prior to the time of the trial of those cases. I did find at the time of the trial that there was a policy and I knew that that policy

(Testimony of E. J. McCabe.)

was delivered to Coverdale. I addressed Coverdale upon the subject and he said he lost it and that he would look for it when he got home, if he could find it. Afterwards I never asked him about it but I had asked you as I knew you were Coverdale's Attorney. As a matter of fact I know that you and Mr. Boone appeared on behalf of Mr. Coverdale, this partnership, in the lower court. [110]

When I first wrote to the United States Fidelity and Guaranty Company they did not reply that they didn't have a policy—on the contrary the first reply was that they would not furnish that. I then wrote back and told them we would compel them to produce it under the laws of the State of Montana under an order of court. It was then that they said they didn't have the policy, or didn't know where it was, and they sent me the daily report. I do not know whether the policy which you have in your hand had been in Coverdale's possession all this time. I was told by the United States Fidelity and Guaranty Company that it did not have the policy. When I received the photostatic copies which were offered in evidence, they said in their letter that those were copies from their files of their daily report, or their information upon this policy.

Q. I am just handing you the policy itself. Just look at it will you? Are you able to tell me from an examination of that policy whether or not it is the public liability policy furnished by the United

(Testimony of E. J. McCabe.)

States Fidelity and Guaranty Company to Coverdale & Johnson? A. No, I can't.

Q. Take the daily report——

The Court: I think you ought to give him an opportunity to examine the policy—not spring it on him and expect him to analyze it, and digest it, and tell us what it is.

The Witness: I can take the photostatic copies and make the comparison at recess. I wrote that letter that I have on July 21, 1937, and got an answer on August 4, 1937, and it was at that time that I received from the United States Fidelity and Guaranty Company what information it had in respect to the policy. [111]

It was the day of the trial in the district court, after the jury had gone out, that I talked with Coverdale in my attempt to get a copy of the policy from him. I did not later communicate with Mr. Coverdale and ask him for the policy but I communicated with you and talked with you about it. You didn't tell me that you did not have it but you said you would try to get it from him, if he had it, that you would write me. I remember you told me that Coverdale had the policy, if anyone had it.

Whereupon a recess was had.

(Testimony of E. J. McCabe.)

After recess.

Cross Examination
Mr. McCabe
Continued:

The Witness: I have had time to examine the policy and the daily report. I find they are substantially the same. I find a difference in the form in that in the daily report there is no signature of the man by the name of Bowman that appears on the policy. I do not know whether Bowman would likely be the local agent who wrote the policy.

Witness Excused.

Plaintiff Rests

Defendant's Case

Whereupon

JOHN M. COVERDALE,

a witness called and sworn on behalf of the defendant, testified as follows:

Direct Examination

By Mr. Toole:

The Witness: My name is John M. Coverdale. I was a member of the partnership of Coverdale & Johnson. We had a contract, which has been testified to here, for the construction of some bridges near Augusta in 1934. We had two contracts, both

(Testimony of John M. Coverdale.)

with [112] the Montana State Highway Commission. As to the contract for the construction of bridges on the Augusta-Sun River road, and as to the location of the bridges with respect to the town of Augusta, there was one bridge twelve miles on the other side of Simms, where the accident happened, and the furthest bridge is twenty-two miles from Simms.

The closest of the bridges to the town of Simms was twelve miles from Simms and the other bridges were scattered from that twelve mile point to twenty-two miles distant. There were five structures in that one contract and the closest bridge to the town of Simms was located twelve miles from Simms. I recall when the accident happened and at the time this accident happened all of those bridges were completed but the one over the Sun River—the concrete bridge—it was not completed at the time. That bridge is twenty-two miles from Simms. Coverdale & Johnson were not working or operating on that bridge at the time of the accident. At the time of the accident we were operating on the Augusta-Choteau road on the canal—large government canal —that was the bridge we were working on. That was twenty-eight miles from the town of Simms. At the time that this accident happened the closest operation that Coverdale & Johnson had was on the canal—that would be twenty-eight miles from the town of Simms. At that time we were not working

(Testimony of John M. Coverdale.)

at all at any point closer than twenty-eight miles from Simms.

I am familiar with the location of the City of Great Falls and the town of Simms and the town of Augusta, from the place where our work was being carried on. There is a highway leading from Great Falls out to Simms, to Augusta and to the vicinity of our work. Such highway was there at the time of the accident; it has been improved since but I had nothing to do with the [113] improving of that. The firm of Coverdale & Johnson was not carrying on any work in the vicinity of Simms at the time of the accident. The accident occurred on the side of the main traveled highway.

We had a public liability policy covering our operation at that time. Being handed a document, marked defendant's exhibit 27, I think it is the policy which I gave to Mr. Boone about a month ago and I am sure that it is the policy we were carrying at the time Coverdale & Johnson were working on construction of those bridges under those contracts.

Mr. Toole: Now, we offer defendant's exhibit No. 27 in evidence.

Mr. McCabe: No objection.

The Court: It may be received in evidence.

Whereupon defendant's exhibit No. 27 was received in evidence, without objection, and filed with the Clerk of the Court and the material portions of which are as follows:

(Testimony of John M. Coverdale.)

DEFENDANT'S EXHIBIT 27

United States

No. PC 19715

Fidelity and Guaranty Company
Baltimore, Maryland,
A Stock Company
(Hereinafter Called the Company)

In consideration of the premium and of the statements which are set forth in the Schedule of Statements, does hereby agree with the Assured named in the Schedule of Statements as follows:

Agreements

Insurance Provided

I. To settle and/or defend in the manner hereinafter set forth all claims resulting from liability imposed upon the Assured by law for damages on account of bodily [114] injuries, including death at any time resulting therefrom, accidentally suffered or alleged to have been suffered within the policy period defined in Statement 2 by any person or persons other than employees of the Assured, by reason of and during the progress of the work described in Statement 4 at the places named therein and elsewhere, if caused by employees of the Assured engaged as such in said operations at said places; but who are required in the discharge of their duties to be from time to time at other places, except driving or using any vehicle or auto-

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

mobile or any draught animal or loading or unloading any such vehicle.

Defense

II. To defend in the name and on behalf of the Assured any suit brought against the Assured to enforce a claim, whether groundless or not, for damages on account of bodily injuries, including death at any time resulting therefrom, accidentally suffered or alleged to have been suffered by any person or persons other than employees of the Assured.

Expense

III. To pay, irrespective of the limit of liability provided for in Item 3 of the Statements hereof, the expenses (including as a part thereof the cost of such immediate surgical relief as is imperative at the time of the accident, court costs, all premiums on release-of-attachment and/or appeal bonds required in any such proceedings, and all interest accruing after entry of judgment for any part of which the Company is liable hereunder and up to the date of payment, tender or deposit in court by the Company of its share of such judgment) incurred by the Company in investigation, negotiation for settlement or defense.

Service

IV. To serve the Assured (1) by inspection of work places specified in the Schedule of Statements

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

whenever deemed [115] necessary by the Company, and thereupon to suggest to the Assured such changes and improvements as may operate to reduce the number and severity of injuries (without liability, however, upon the Company for failure so to do); and (2) upon notice of such injuries, by investigation thereof and by such negotiation and/or settlement of resulting claims or suits as may be deemed expedient by the Company.

Limitation of Liability

V. The Company's liability under this policy is limited as expressed in Statement 3 of said Schedule. If there be more than one named in the Schedule of Statements as the Assured, the said limits shall be available to them jointly, but not to more than one of them severally.

The Foregoing Agreements Are
Subject to the Following Conditions:

Exclusions

Condition A.

This policy shall not cover loss from liability for, or any suit based on, injuries or death;

(1) Caused by any person employed by the Assured (a) contrary to law as to age of employment, or (b) under fourteen years of age in any state in which there is no law restricting the age of employment, or by any contract convict laborer.

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

(2) Caused to or by any person while in or on any elevator, hoisting device or appliance, or in any elevator well or hoistway, or while entering upon or alighting from any elevator or hoisting device.

(3) Caused by any draught or driving animal or vehicle or automobile owned or used by the Assured or any person employed by the Assured while engaged in the maintenance or use of same elsewhere than upon the insured premises.

(4) Caused by accidents occurring after the final completion of the work performed by the Assured at the place of occur- [116] rence of such accidents.

(5) Caused by any aircraft.

(6) Caused by reason of any work sublet by the Assured.

(7) Nor shall this policy cover (a) liability of others assumed by the Assured under any contract or agreement—oral or written. (b) any obligation assumed by the Assured or imposed upon the Assured under any Workmen's Compensation agreement, plan, or law.

Condition AA.

If while this policy is in force there shall be any change in or addition to the classifications of work undertaken by the Assured as set forth in Item 4 of the Schedule of Statements, this policy

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

shall automatically extend to cover such work, and the premium therefor shall be adjusted in accordance with the Company's Manual rates applicable thereto, unless specifically excluded by endorsement. But nothing herein contained shall be construed as extending the policy to cover any location not specified herein; nor shall such automatic extension cover structural iron and steel erection, bridge building, wrecking, caisson work, tunnelling, railroad or subway construction, sewer building or crib work.

Computation of Premium

Condition B.

(1) The Premium is based upon the total remuneration earned during the policy period by all employees of the Assured engaged in connection with the business or work described in and covered by this policy except drivers and chauffeurs, provided such drivers and chaffeurs are not specifically included in the classification of work described in this policy.

(2) If the Assured is a corporation, the entire remuneration of the president, any vice-president, secretary or treasurer shall be subject to premium charge at the rate applicable [117] to the hazard to which such officer is exposed, subject, however, to a maximum individual salary of $100 a week; and, provided further, that if any such officer per-

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

forms the duties of a superintendent, foreman or workman, his entire remuneration, subject to the foregoing limitation, shall be included in the calculation of premium at the highest rate applicable to any duty which he may undertake.

(3) If the Assured be an individual or a copartnership, the proprietor or partners performing the duties of superintendent, foreman or workman shall be included in the total remuneration earned at the rate of $2,000 each per annum.

(4) The premium is subject to adjustment at the termination of the policy period when the Assured shall furnish to the Company, for the purpose of said adjustment, a written statement of the exact amount of remuneration earned by the said employees during the period of such adjustment.

(5) If the earned premium computed thereon at the rate or rates specified in the policy exceeds the premium paid, the Assured shall immediately pay the additional amount to the Company; if less, the Company shall return to the Assured the unearned premium; but the Company shall receive or retain not less than the minimum premium provided in Item 4, Schedule of Statements, except in the event of cancellation by the Company.

(6) The Assured shall keep complete and accurate records corresponding with the classifications of risk enumerated in the policy showing the remuneration earned by employees under each such

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

classification, and failure to keep such records shall entitle the Company to apply the highest premium rate provided by the policy to the entire remuneration earned. [118]

(7) The word "remuneration" used in this policy shall include all salaries, wages and other sums paid for regular time, overtime, piece-work, or for allowances and also the cash equivalent of all board, merchandise, store certificates, or any other substitute for cash.

Cancellation of Insurance

Condition C.

This policy may be cancelled either by the Company or the Assured at any time by not less than five days' written notice to the other stating when cancellation shall be effective. Notice of cancellation sent by mail to the address of the Assured herein given shall be sufficient notice and check of the Company or the Company's authorized agent similarly mailed a sufficient tender of any unearned premium, but no unearned premium shall be payable until the amount of remuneration expended during the period the policy was in force shall have been determined either by a written statement furnished to the Company by the Assured or an examination of the Assured's records as provided in Condition D. If cancelled by the Assured the Company shall be entitled to an earned premium according to the

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

short-rate table printed hereon, and computed on the entire earnings for the period of the policy as indicated by the actual earnings of the Assured's employees during the time the policy shall have been in force. If cancelled by the Company, or by the Assured upon retiring from business, the Company shall be entitled to an earned premium pro rata when determined; in any event when cancelled at the request of the Assured the Company shall retain not less than the minimum premium stated in the policy.

Inspection and Audit

Condition D.

The Company shall be permitted at all reasonable times (a) to inspect the plants, works, machinery, appliances, and premises covered under [119] this policy (b) to examine the Assured's books and records at any time during the policy period and within one year after the end of the policy period for the purpose of determining the actual premium earned while this policy was in force; and the Assured shall, when requested by the Company, furnish the Company with a written statement of the amount of remuneration earned by any of the persons referred to in Condition "B".

Report of Accident

Condition E.

Upon the occurrence of an accident the Assured shall give, as soon as reasonably possible, notice

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

thereof, with the fullest information obtainable, to the Company at its Home Office, or to a duly authorized agent of the Company. If a claim is made on account of such accident, the Assured shall give like notice thereof with fullest particulars. If thereafter a suit is brought against the Assured to enforce such a claim, the Assured shall, as soon as reasonably possible, forward to the Company at its Home Office every summons or other process as soon as same shall be served on him.

Co-Operation

Condition F.

The Assured shall not voluntarily assume any liability, nor incur any expense, other than for such immediate surgical relief as is imperative at the time of an accident, nor settle any claim, except at the Assured's own cost. The Assured shall not interfere in any negotiations for settlement, or in any legal proceeding; but whenever requested by the Company, and at the Company's expense, the Assured shall aid in securing information and evidence and the attendance of witnesses; and shall cooperate with the Company (except in a pecuniary way) in all matters which the Company deems necessary in the defense of any suit or prosecution of any appeal.

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

Action Against the Company

Condition G.

No action shall lie against the Company to recover for any loss under this policy [120] unless brought within two years after the amount of such loss is made certain either by judgment against the Assured after the trial of the issue or by agreement between the parties with the written consent of the Company.

Insolvency of Assured

Condition H.

The insolvency or bankruptcy of the Assured shall not release the Company from the payment of damages for injuries sustained or loss suffered by any person or persons as the result of an accident occurring while this policy is in full force and effect; and in case execution against the Assured is returned unsatisfied in an action brought by the injured or his or her personal representatives in case of death resulting from the accident, because of such insolvency or bankruptcy, then an action may be maintained by the injured person or his or her personal representatives against the Company under the terms of this policy for the amount of the judgment in said action, not exceeding the limits expressed in the policy.

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

Special Statutes

Condition I.

If the method of serving notice of cancellation or the limit of time for notice of accident or for any legal proceedings herein contained is at variance with such specific statutory provision in relation thereto in force in the state in which the business operations herein described are conducted, such specific statutory provision shall supersede any condition in this contract inconsistent therewith.

Subrogation

Condition J.

In case of payment of loss under this policy, the Company shall be subrogated to all interests of the Assured against any person, co-partnership or corporation, and respects such loss, to the amount of such payment, and the Assured shall execute all papers required and shall co-operate [121] with the Company to secure the Company such rights.

Other Insurance

Condition K.

If the Assured carries other valid insurance against loss covered by this policy, the Assured shall not be entitled to recover from the Company a larger proportion of the entire loss than the amount hereby insured bears to the total amount of valid and collectible insurance.

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

Assignment

Condition L.

No assignment of interest under this policy shall bind the Company, unless the consent of the Company shall be endorsed hereon as provided in Condition "M". In case of the death, insolvency or bankruptcy of the Assured during the policy period, this policy shall cover for its unexpired term the legal representative of the Assured, provided notice shall be given to the Company at its Home Office in writing within thirty days after the date of such death, insolvency or bankruptcy.

Policy Changes

Condition M.

No changes in the agreements, conditions or statements of this policy or of any subsequent agreement, which may be made a part hereof, shall be valid unless set forth in writing and signed by the President, Vice-President or one of the Secretaries of the Company; nor shall notice to or knowledge of any agent or other person in respect to these matters be notice to the Company, and no agent or other person has any right or authority to waive this provision.

Statements

Condition N.

The statements in items numbered 1 to 8 inclusive in the Schedule of Statements are true, or, if esti-

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

mates only, are believed to be true. This Policy is issued upon such statements and in consideration of the provisions of the Policy respecting its premium together with the payment of the premium herein expressed. [122]

Schedule of Statements:

Item 1. Name of Assured John M. Coverdale and E. O. Johnson, copartnership, doing business under the firm name of

Coverdale & Johnson

P. O. Address Anaconda, Montana

Records of the Assured's books are kept at? Anaconda, Montana

Individual, Co-Partnership, Corporation, or Estate? Co-partnership

If Individual or Co-Partnership, give full name or names John M. Coverdale, E. O. Johnson

Item 2. The Policy Period (unless sooner terminated by cancellation), shall be from October 1st, 1934, to October 1st, 1935, at twelve and one minute o'clock A. M. standard time at the Assured's address.

Item 3. The Company's liability for an accident, resulting in injuries to or in the death of one person, is limited to Five Thousand Dollars ($5,000.00) and, subject to the same limit for each person, the Company's liability for an accident, resulting in injuries to or in the death of two or more persons, is limited to Ten Thousand Dollars ($10,000.00).

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

Item 4. A complete description of the work covered by this Policy, the locations of all places where such work is to be done, the estimated remuneration of all employees engaged in such work for the period of this Policy, the premium rate or rates and the estimated premium are as follows:

	See Endorsement Attached	See Endorsement Attached	
			[123]
(b) Clerical Office Employees, Draughtsmen	No. 8810	Nil	Nil
(c) Outside Salesmen, Collectors and Messengers who do not deliver merchandise	No. 8742	Nil	Nil
		Deposit Premium	

Minimum Premium for this Policy is $18.00. Estimated Advance Premium $50.00

Item 5. No explosives are used, allowed or kept at the place named in Statement 4, except those usual to the work covered hereby No exceptions

Item 6. There is no operation of locomotives and/or cars by means of locomotives, except as follows: No exceptions

Item 7. No similar insurance has been declined or cancelled by any Company during the past three years, except as herein stated No exceptions

Item 8. No part of the work is sub-contracted directly or indirectly except as herein stated

No exceptions

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

In Witness Whereof, The United States Fidelity and Guaranty Company has caused this Policy to be signed by its President and its Secretary, but the same shall not be binding upon the Company unless countersigned by a duly authorized representative of the Company.

R. HOWARD BLAND
President
W. W. SYMINGTON
Secretary

Countersigned by

JOHN W. BOWMAN
Authorized Representative.

[124]

SCHEDULE
SUPPLEMENTARY TO ITEM 3 OF DECLARATIONS

No. 1

Kind of Trade, Business, Profession or Occupation: (Manual Classification)	Division of Operators:	Estimated Payroll of Employes for Policy Term	Manual Premium Rate per $100 of Employes Payroll	Estimated Advance Premium
Concrete Construction—including foundations, or making, setting up or taking down forms, scaffolds, falsework or concrete distributing apparatus—N. P. D. with "Street or Road Construction"—(excavation, and all work in sewers, tunnels, subways, caissons or coffer-dams to be separately rated)....5213	NRH-275 "A" Unit #2, being construction of two timber pile bridges on Augusta-Choteau Road, Lewis and Clark County, Montana and NRH-176 "E", Unit #2, being construction of concrete and timber pile bridges Augusta-Sun River Road, Lewis and Clark County, Montana and elsewhere in the State of Montana.	If any	.396	Deposit Premium $50.00 Quarterly Premium Adjustment
Excavation—for cellars or foundations of buildings, bridges, retaining walls or dams—including rock—no tunneling....3470		If any	1.188	
Iron or Steel Erection—bridges...5067		If any	.984	
Pile Driving—N. O. C....6003		If any	.168	

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

Attached to and forming part of Policy No. PC-19715 Issued by the United States Fidelity and Guaranty Company, of Baltimore, Maryland,

To Coverdale & Johnson of Anaconda, Montana

Dated at Anaconda, Montana this 1st day of October, 1934

Countersigned JOHN W. BOWMAN
Authorized Representative.

[125]

Property Damage Endorsement

No. 2

In consideration of the premium hereinafter provided, the policy to which this endorsement is attached is hereby extended as follows:

1. To indemnify the Assured against loss by reason of the liability imposed upon him by law for damages as respects injury to or destruction of property other than the property owned, leased, occupied, or used by, or in the care, custody or control of the Assured or any of his employes, resulting solely and directly from an accident due to the business operations of the Assured described in Item 2 of this endorsement.

2. This endorsement shall be null and void unless attached to the Public Liability policy of the United States Fidelity and Guaranty Company issued to the Assured, and in force at the date of any accident for which claim is made hereunder, the number of

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

which policy is given at the bottom of this endorsement. This endorsement shall not apply to any of the causes of accidents which are excluded in Condition "A" of the said policy in so far as such exclusions are not inconsistent with the specific undertakings of this endorsement. This endorsement shall not apply to such injury or destruction if due to (a) the ownership, care, maintenance, operation, or use of any elevator or escalator or any aircraft, or any automobile, draft animal, team or other vehicle; (b) the explosion, collapse, or rupture of any boiler or other receptacle under pressure, including parts thereof; (c) the breaking, disrupting, or tearing asunder of any engine, flywheel, or turbine; (d) the breaking, burning out, or disrupting of any electrical power unit; (e) due directly or indirectly to fire; (f) the discharge, leakage or precipitation of water or [126] steam from automatic sprinkler systems, plumbing systems, tanks, steam or hot water heating pipes or radiators, elevator tanks or cylinders, stand pipes for fire hose; and rain or snow admitted to the interior of buildings by defective roofs, leaders or spouting, or through broken or open windows or skylights, at or from premises owned, leased or rented by the Assured; (g) the collapse of or structural injury to any building or structure adjacent to the insured premises due to the removal of other buildings, structures or supports; or due to excavation below the natural sur-

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

face of the ground, or to blasting therein or thereon; (h) explosions of every character not here before excluded.

3. Agreements 1, 2, 3, and 4 of said policy, in so far as their provisions are not inconsistent with this endorsement, are hereby made a part of the obligations of the Company as fully and completely as though wholly written or printed herein, it being understood that the injuries therein referred to shall, for the purpose of this endorsement, be construed as injury to or destruction of property as hereinbefore described and defined.

4. All the terms, conditions, and requirements expressed in said policy of the United States Fidelity and Guaranty Company, including those contained in the Schedule of Statements forming part thereof, so far as the same are not inconsistent with the expressed obligations of this endorsement, are hereby made a part of this endorsement as fully and completely as though written or printed herein; it being further understood and agreed that this endorsement covers only the operations at the locations specifically described in Item 2 of the Schedule of Statements. [127]

5. The estimated advance premium for this endorsement is computed by applying such rates as are stated in Item 2 of said schedule to the premium basis stated in Item 4 of the Schedule of Statements in said policy. Such premium basis and the result-

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

ing premium are subject to adjustment as in said policy provided.

6. This endorsement may be cancelled without effect upon the policy to which it is attached in the same manner in which said policy can be cancelled, but cancellation of said policy shall operate as a cancellation of this endorsement as of the same date without notice. In the event of cancellation the requirements of said policy respecting its Minimum Premium shall apply to the Minimum Premium for this endorsement.

7. The Company's limit of liability under this endorsement on account of any one accident resulting in injury to or destruction of the property of one or more persons, shall be the actual value of the property injured or destroyed at the time of such injury or destruction, together with the loss of use thereof, but in no event in excess of the total sum of One Thousand and 00/100—Dollars.

Schedule of Statements

Item 1. This endorsement is to become effective October 1st, 1934, 12:01 *l'*clock A. M. Standard Time. The period between the effective date of this endorsement and the expiration of said policy is herein called the endorsement period.

Item 2. The premium rates stated below are applied to the same premium basis as is used in said policy for computing premium. Such premium

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

basis and the resulting premium for this endorsement are subject to adjustment as in said policy provided. [128]

Classification of Operations	Location	Premium Basis	Premium Rates	Premium
Concrete Construction etc.....5213	See Endorsement No. 1 for Location of Operations	If any	.45	Deposit Premium $50.00
Excavation etc...3460		If any	.75	Quarterly Premium Adjustment
Iron or Steel Erection—bridges 5067		If any	.75	
Pile Driving—N. O. C.....6003		If any	.20	

Deposit Premium

Minimum Premium $15.00 Estimated Advance Premium $50.00

Attached to and forming part of Policy No. PC-19715 issued by the UNITED STATES FIDELITY AND GUARANTY COMPANY, of Baltimore, Maryland,

To Coverdale & Johnson of Anaconda, Montana

Dated at Anaconda, Montana this 1st day of October, 1934.

E. ASBURY DAVIS
President
W. W. SYMINGTON
Secretary

Countersigned JOHN W. BOWMAN
Authorized Representative

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

United States Fidelity and Guaranty Company

Baltimore, Maryland

Contractors' Public Liability Endorsement

No. 3

In consideration of the premium for the Policy to which this Endorsement is attached, it is hereby understood and agreed as follows:

(A) This policy is extended to cover claims against the Assured for accidental bodily injury arising in connection with:

1. Self-propelled contractors' equipment and appliances (except motorcycles, tractors, and automobiles, whether with or without mounted equipment or mach- [129] inery) with or without towed equipment, while being moved under their own power between places covered by the Policy where the Assured is carrying on his operations;

2. Road graders and road scrapers while being drawn by draught animals between places covered by the Policy where the Assured is carrying on his operations.

(B) Exclusion (3) of Condition A of the Policy is changed to read as follows:

"Caused directly or indirectly by any draught or driving animal, any automobile,

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

trailer, tractor, motorcycle or other vehicle (including the loading and unloading thereof) elsewhere than at the immediate places covered by the Policy where the Assured is carrying on his operations."

instead of as originally written.

(C) If the Assured is protected by other insurance against loss caused by the ownership, maintenance or use of any draught or driving animal, any automobile, trailer, tractor, motorcycle or other vehicle (including the loading and unloading thereof), which is also covered under the Policy to which this Endorsement is attached, then, with respect to such loss, this Policy shall operate only as Excess Insurance over and above such other insurance, anything in Condition K of the Policy to the contrary notwithstanding.

Subject otherwise to all the terms, limits and conditions of the policy to which this endorsement is attached.

This Endorsement is effective as of October 1st, 1934.

Attached to and forming part of Policy No. PC-19715 issued by the United States Fidelity and Guaranty Company, of Baltimore, [130] Maryland.

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

To Coverdale & Johnson of Anaconda, Montana

Dated at Anaconda, Montana this 1st day of October, 1934

E. ASBURY DAVIS
President
W. W. SYMINGTON
Secretary

Countersigned JOHN W. BOWMAN
Authorized Representative

United States Fidelity and Guaranty Company
Baltimore, Maryland

Property Damage Limit Endorsement for Contractors' and Manufacturers' Policies

No. 4

It is understood and agreed that Paragraph No. 7 of the Property Damage Endorsement is hereby expunged and the following substituted in lieu thereof:

> The Company's limit of liability under this endorsement for injury to or destruction of the property of one or more persons shall be the actual value of the property injured or destroyed at the time of such injury or destruction, together with the loss of use thereof, but in no event in excess of the sum of $1,000.00 on account of any one accident and, subject to that limit for each such accident, the Company's total limit of liability for all accidents occur-

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

ring during the policy term shall not exceed $10,000.00, said total limit of liability shall be successively reduced by the amount of each and every claim paid by the Company.

Subject otherwise to all the terms, limits and conditions of the policy to which this endorsement is attached.

This Endorsement is effective as of October 1st, 1934 [131]

Attached to and forming part of Policy No. PC-19715 issued by the United States Fidelity and Guaranty Company, of Baltimore, Maryland,

To Coverdale & Johnson of Anaconda, Montana

Dated at Anaconda, Montana this 1st day of October, 1934

E. ASBURY DAVIS
President
W. W. SYMINGTON
Secretary
Countersigned JOHN W. BOWMAN
Authorized Representative

No. 5

It is Understood and Agreed, That Item #3 of the Schedule of Statements of the undermentioned policy is amended to read as follows:

The Company's liability for an accident resulting in injuries to or in the death of one person is

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

limited to Ten Thousand Dollars ($10,000.00) and, subject to the same limit for each person, the Company's liability for an accident resulting in injuries to or in the death of two or more persons is limited to Twenty Thousand Dollars ($20,000.00).

Subject otherwise to all the terms, limits and conditions of the policy to which this endorsement is attached.

This Endorsement is effective as of October 1st, 1934

Attached to and forming part of Policy No. PC-19715 issued by the United States Fidelity and Guaranty Company, of Baltimore, Maryland,

To Coverdale & Johnson of Anaconda, Montana
Dated at Anaconda, Montana this 1st day of October, 1934

E. ASBURY DAVIS
President
W. W. SYMINGTON
Secretary
Countersigned JOHN W. BOWMAN
Authorized Representative

[132]

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

United States Fidelity and Guaranty Company

Baltimore, Md.

No. 6

Deposit Premium Endorsement

It Is Hereby Understood and Agreed, That subject in all other respects to the terms and conditions of the undermentioned policy, the Assured shall pay a deposit premium of Fifty and 00/100 Dollars, ($50.00 P. L.) Fifty and 00/100 Dollars ($50.00 P. D.) in advance, and shall render, over his signature, at the end of each Three months period a statement of the wages actually expended under said policy; and shall forthwith pay to the Company the premium on such wages at the rates named therein; the deposit premium to be applied on the final premium adjustment under the policy.

Attached to and forming part of Policy No. PC-19715 Issued by the United States Fidelity and Guaranty Company, of Baltimore, Maryland,

To Coverdale & Johnson of Anaconda, Montana

Dated at Anaconda, Montana this 1st day of October, 1934

R. HOWLAND BLAND
President
W. W. SYMINGTON
Secretary

Countersigned JOHN W. BOWMAN
Authorized Representative

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

United States Fidelity and Guaranty Company
Baltimore, Maryland

Endorsement No. 7

Upon ten days' advance notice by the Assured of any operations as described under Code No. 5067 to be undertaken, giving the exact location and the description of the work and estimate payroll and duration of such work, this policy may be extended to cover such specific work only by the issuance of an endorse- [133] ment by the Company.

Nothing herein contained shall be held to vary, alter, waive or change any of the terms and conditions of this policy, other than as stated above.

Subject otherwise to all the terms, limits and conditions of the policy to which this endorsement is attached.

This Endorsement is effective as of October 1st, 1934.

Attached to and forming part of Policy No. PC-19715 issued by the United States Fidelity and Guaranty Company, of Baltimore, Maryland,

To Coverdale & Johnson of Anaconda, Montana

Dated at Anaconda, Montana this 1st day of October, 1934

E. ASBURY DAVIS
President
W. W. SYMINGTON
Secretary

Countersigned JOHN W. BOWMAN
Authorized Representative

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

United States Fidelity and Guaranty Company

Baltimore, Maryland

Endorsement No. 8

In Consideration of the premium at which the undermentioned policy is written, it is hereby understood and agreed that said policy is extended to cover operations described under Code No. 5067 set forth in the schedule of operations attached to the undermentioned policy as applicable to that certain work designated as NRH-275 "A" Unit #2, being two timber pile bridges on Augusta-Choteau Road and NRH-176 "E" Unit #2, being concrete and timber pile bridges on Augus*ts*-Sun River Road, Lewis and Clark County, Montana.

Subject otherwise to all the terms, limits and conditions of the policy to which this endorsement is attached. [134]

This Endorsement is effective as of October 1st, 1934.

Attached to and forming part of Policy No. PC-19715 issued by the United States Fidelity and Guaranty Company, of Baltimore, Maryland,

To Coverdale & Johnson of Anaconda, Montana

Dated at Anaconda, Montana this 1st day of October, 1934.

E. ASBURY DAVIS
President

W. W. SYMINGTON
Secretary

Countersigned JOHN W. BOWMAN
Authorized Representative

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

Contractors Service Endorsement

Effective: 2-6-35

Expiration: 10-1-35 No. 9

It is Understood and Agreed that the policy to which this endorsement is attached is issued to cover specific work located at NRH-109 "A", Unit 5, being construction concrete bridge on Witt Hill section U. S. Highway No. 10, Stillwater County, Montana.

For the benefit of the Assured and the Company, it is further understood and agreed that when additional work at other locations is undertaken the Assured will advise the Company of the nature and location of such work, as soon as reasonably possible, in order that the Company may make arrangements for prompt inspection, claim and medical attention necessary to serve the Assured in the most advantageous and economical manner.

Nothing herein contained shall be held to vary, alter, waive or change any of the terms, conditions or limits of this policy other than as stated above.

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

Attached to and forming part of Policy No. PC-19715 issued by the United States Fidelity and Guaranty Company, of Baltimore, [135] Maryland,

To Coverdale & Johnson of Anaconda, Montana

Dated at Helena, Montana this 6th day of February, 1935.

E. ASBURY DAVIS
President
W. W. SYMINGTON
Secretary

Countersigned L. K. ALBRECHT
Authorized Representative

The Witness: After this accident I consulted an attorney, you, Mr. Toole in Missoula. You were my attorney at the time. You represented me at the trial of those cases and during the period after the accident and clear on through the Supreme Court.

Cross Examination

By Mr. McCabe:

The Witness: I stated that after the accident I employed Toole & Boone to represent me as attorneys. The United States Fidelity and Guaranty Company did not pay any part of the expense or fees for defending the action. I have not paid my attorney's fees yet; I paid some but not all of them.

(Testimony of John M. Coverdale.)

They told me that they were absolutely out of it; they would have nothing to do with it.

My attention being called to the policy introduced here wherein it provides that the "company would defend all actions and proceedings, defend in the name and on behalf of the assured any suit brought against the assured to enforce a claim, whether groundless or not, for damages on account of bodily injuries, including death, at any time resulting therefrom accidentally suffered, or alleged to have been suffered by any person or persons other than employees of the assured," they absolutely said that the policy did not cover that accident. [136]

Being asked if they refused to defend the action, absolutely not, they said they were out of it. I did pick that up—that item you read off there and they said that the policy did not cover any accident from the project to any point from the project, or from any point to the project. Being asked if I notified them of this accident and called their attention to the policy, I said, "We are sued" and that was all there was to it. They wouldn't take it over; they refused to defend.

I do not know whether they paid part of the attorney's fees to Messrs. Toole & Boone in connection with that expense; not that I know of. Mr. Toole gave me a good big bill for it. Mr. Toole didn't tell me that the company had paid some part of these expenses under the policy.

Witness Excused

Whereupon

HOWARD TOOLE

was called and sworn as a witness on behalf of the defendant, and testified as follows:

The Witness: My name is Howard Toole.

Mr. McCabe: I extend the same courtesy to you that you so kindly extended to me. You may testify in narrative form.

Witness (Continuing): I am an attorney, admitted to the bar in Montana; residing in Missoula, and a member of the firm of Toole & Boone. John M. Coverdale prior to the accident had been my client. Shortly after the filing of the complaints which have been introduced in evidence, possibly within three or four days thereafter, Mr. Coverdale came to Missoula and employed me to defend him, or to defend the firm of Coverdale & Johnson in those actions, which I agreed to do and undertook to do. I did defend these actions. Some time about the 16th of April in 1936, I had seen the policy of insurance which has been introduced here, and I knew that Mr. Coverdale had a contractor's [137] public liability insurance policy. I read the policy at about the time when the actions were commenced, and then considerably later, I think it must have been perhaps a year later, it was in April, I think of 1936, I notified the United States Fidelity and Guaranty Company of the pendency of the actions. Called their attention to the defense clause, and in conversation with Mr. Ros-

(Testimony of Howard Toole.)

siter, who is their attorney in charge of their claims department in Montana, I discussed this matter of the defense under that clause, which I think is the first clause in the policy, and at Mr. Rossiter's request I obtained from Mr. Coverdale an agreement which is entitled "Non-Waiver Agreement" dated April 16, 1936, signed by Coverdale & Johnson, by John M. Coverdale, party of the first part, and by W. A. Rossiter of the United States Fidelity and Guaranty Company, as party of the second part. I am able to identify Mr. Coverdale's signature, and Mr. Rossiter's signature, and the agreement has to do with the defense of these actions, and I want first to offer that agreement in evidence.

Mr. McCabe: We have no objection to that.

Whereupon said agreement, defendant's exhibit No. 28, was received in evidence, without objection, and filed with the Clerk of the Court and said exhibit is as follows:

DEFENDANT'S EXHIBIT 28

NON-WAIVER AGREEMENT

It is hereby mutually understood and agreed by and between Coverdale & Johnson, a partnership, the party of the first part, and United States Fidelity & Guaranty Company, the part of the second part, that any action taken by the said party of the second part in investigating an accident which occurred on or about December 11th, 1934, in or near the town of Sims, Montana, [138] result-

(Testimony of Howard Toole.)

ing in the death of Marguerite and Roberta Doheny, in the defense and trial of the actions pending in the District Court of Cascade County entitled "Ethel M. Doheny, as administratrix of the estate of Marguerite Doheny, deceased, plaintiff, vs. John M. Coverdale and E. O. Johnson, a co-partnership, doing business under the firm name and style of Coverdale & Johnson, defendants," and "Ethel M. Doheny, as administratrix of the estate of Roberta Doheny, deceased, plaintiff, vs. John M. Coverdale and E. O. Johnson, a co-partnership, doing business under the firm name and style of Coverdale & Johnson, defendants," arising out of said accident shall not waive or invalidate any of the conditions of the policy of the party of the second part held by the party of the first part, and shall not waive or invalidate any rights whatever of either of the parties to this agreement.

The intent of this agreement is to preserve the rights of the parties hereto and to provide for an investigation of said accident and the trial and defense of said actions above entitled, without regard to the liability of the party of the second part.

Signed in duplicate this 16th day of April, 1936.

COVERDALE & JOHNSON,
By JOHN M. COVERDALE
Party of First Part
UNITED STATES FIDELITY
& GUARANTY COMPANY,
By W. A. ROSSITER
Party of Second Part. [139]

(Testimony of Howard Toole.)

Witness (Continuing): Following the execution of the agreement, and the trial of the cases, I billed Mr. Coverdale for expenses and services rendered, and he didn't pay me all of them, part of it, he paid, I cannot remember how much, and I also billed the United States Fidelity and Guaranty Company for a part of the services rendered, which was paid. They did not pay the full amount of the bill.

Cross Examination

By Mr. McCabe:

The Witness: Prior to December, 1934, I have represented the United States Fidelity and Guaranty Company in specific cases. When this action came to my attention I did not immediately communicate the facts concerning the actions to the United States Fidelity and Guaranty Company. Sometime afterwards I did—at about in April, it must have been considerably over a year after the accident happened, before any communication with the United States Fidelity and Guaranty occurred, as far as I know. It was prior to the trial of the actions in State Court.

I stated that after this bill to Mr. Coverdale for services that the United States Fidelity and Guaranty did not pay the full amount of the bill; they paid part only.

Witness Excused

Whereupon

JOHN M. COVERDALE

was recalled as a witness on behalf of the defendant, and testified as follows:

Direct Examination

By Mr. Toole:

The Witness: Being asked if Mr. McCabe ever asked me for this policy—not that I know of. Mr. McCabe did not ask me for a copy of this policy at the time of the trial of these actions [140] as I never talked to Mr. McCabe—the only words we exchanged, that I know of, were on the witness stand.

Cross Examination

By Mr. McCabe:

The Witness: I do not remember that you went over and spoke to me or that we had a conversation at the side of the table on this side of the jury box after the cases were closed and the jury had gone out to consider of their verdict. I do not remember that we had a conversation at that time—only the questions that you asked me on the witness stand, because I was pretty sore at you. Every time I made a move you pointed your finger at me. I was pretty sore at you. I don't believe I would carry on a conversation with you at that time. I would say we had no conversation at that time.

Witness Excused

Whereupon

W. A. ROSSITER,

a witness called and sworn on behalf of the defendant, testified as follows:

Direct Examination

By Mr. Toole:

The Witness: I am Claims Attorney for the United States Fidelity and Guaranty Company for the State of Montana. I have been in the employ of the company for twelve years and have been engaged as Claims Attorney for that company for twelve years. I am familiar with the practice of that company since October, 1934, as to the method of writing a contractor's public liability insurance and the records that are kept. The document, plaintiff's exhibit 26, referred to as a daily report and as having been sent to McCabe from Baltimore, is a photostatic copy of regular form daily report.

[141]

When policies are made up, they have the original policy and in it are duplications which are the company records of it and that is what is known as a daily report; it is inside the original policy as the policy is typed up, the duplications from the typewriter go through to the daily report—one is for our records, the branch office, and one is for record in the home office, and the original policy goes to the person to whom the insurance is furnished and the company has nothing left in their records but a

(Testimony of W. A. Rossiter.)
daily report. The company never has an exact duplicate of the original policy.

Being handed the daily report, exhibit 26, and the policy, exhibit 27, I will say that I have not compared them closely but I have glanced through them. Without checking each endorsement on there specifically I would say positively that the daily report is a duplicate copy of the policy provisions and the endorsements are added separately to it and it would have to be checked to see whether one would be missing or be lost. The daily report is a duplicate made right at the time of the original policy.

Mr. McCabe: No cross examination.

Witness Excused

Whereupon

W. T. BOONE,

a witness called and sworn on behalf of the defendant, testified as follows:

Direct Examination

By Mr. Toole:

The Witness: My name is W. T. Boone. I am an attorney, admitted to the bar in Montana, practicing in Missoula as a member of the firm of Toole & Boone. I have, on two occasions, been over the road from Great Falls to Augusta at the point where these bridges were built under the Coverdale

(Testimony of W. T. Boone.)

& Johnson contract. [142] The first occasion was during the year 1935 while I was investigating the accident which was the subject matter of the two actions in the state court. On that particular trip I drove from Great Falls to Simms on to Augusta, but I did not drive on the road leading from Augusta on towards Choteau. I did not know on that first trip where those bridges were located. I learned this morning where the bridges were located. I was with Mr. Coverdale.

The road from Great Falls to Augusta and the site of the bridges in 1934, at the time of the accident, was an oiled highway from Great Falls to Vaughn; from Vaughn on to Simms the road was a gravelled highway which had been surfaced. That condition of the road continued for a ways past Simms, but a part of the road between Simms and Augusta was under construction, and was a gravelled road, and had not yet been surfaced. The highway from Great Falls to Augusta is a main traveled highway and has a United States designation number and it was such at the time of this accident.

I have checked to see how close the closest bridge constructed by Coverdale & Johnson was and is to the town of Simms where the accident occurred. This morning when we drove to just this side of Augusta, I checked my speedometer reading at the point where the accident occurred and then I checked it at the first bridge that was designated to me by Mr. Coverdale. The distance was 12.3 miles.

(Testimony of W. T. Boone.)

Mr. Coverdale designated this morning to me the only bridge under that contract which had not been completed at the time of the accident. That was a concrete bridge, the only concrete bridge, in what is known as the Augusta-Sun River contract which has been introduced here in evidence. That bridge was 21.4 [143] miles from the point where the accident occurred.

The two bridges on the Choteau road come under a different contract which Coverdale & Johnson had with the State of Montana. The first of those two bridges is a small stock pass bridge which is located 26.6 miles from Simms—the point where the accident occurred. The second bridge was a large bridge across a large canal which was located 1.8 miles farther than the first of the two bridges, and 28.4 miles from the point where the accident occurred.

Mr. McCabe: No cross examination.

Witness Excused

Whereupon

JOHN M. COVERDALE,

a witness recalled on behalf of the defendant, testified as follows:

Direct Examination

By Mr. Toole:

The Witness: At the time when the accident occurred at Simms, Coverdale & Johnson was work-

(Testimony of John M. Coverdale.)

ing on the bridge over the canal on the Augusta-Choteau road. The concrete bridge was unfinished but we were not working on it at that time.

Mr. McCabe: No cross examination.

Witness Excused

Mr. Toole: The defendant rests.

Rebuttal

Whereupon

ETHEL M. DOHENY,

a witness recalled in rebuttal, testified as follows:

Direct Examination

By Mr. McCabe:

The Witness: I am the same Ethel M. Doheny who has heretofore testified in this proceeding. I was present at the trial [144] of the two cases in the state court concerning which evidence has been introduced in this case. After the jury went out in those cases I saw you go up and speak with Mr. Coverdale. The gentleman you refer to here in the court room is the one I saw you talking to. I didn't hear the conversation but I knew you were conversing together at the time.

Mr. Toole: No cross examination.

Witness Excused

Whereupon

HARRY DOHENY,

a witness recalled in rebuttal, testified as follows:

Direct Examination

By Mr. McCabe:

The Witness: I am the same Harry Doheny who has heretofore testified in this case. I was present at the trial of the cases of Ethel M. Doheny, administratrix, versus the co-partnership of Coverdale & Johnson in the District Court of Cascade County, Montana, concerning which evidence has been introduced in this case. I was in the court room at the time the jury had retired to consider of their verdict in that case. At that time I saw you approach Mr. John M. Coverdale, the gentleman sitting here. I knew you were speaking to him, but of what nature I did not know. I could tell you were speaking to him and he was speaking to you.

Mr. Toole: No cross examination.

Witness Excused

Mr. McCabe: Plaintiff rests.

Mr. Toole: No sur-rebuttal. [145]

Whereupon the Court announced that after the testimony was written up, the plaintiff would have 30 days after receipt of copy of the testimony in which to file a brief; the defendant to have 30 days thereafter in which to file a brief in answer thereto; and the plaintiff to have 15 days thereafter in which to file a reply brief.

[Endorsed]: Filed Oct. 10, 1940. [146]

Thereafter, on August 29, 1940,

OPINION OF THE COURT

was duly filed herein, being in the words and figures following, towit: [147]

[Title of District Court and Cause.]

The above entitled causes, numbered 69 and 70, were heard together, as the facts are identical and the law applicable thereto the same. The pleadings are alike in both cases.

Judgments were obtained in both causes against the contractors in question, Coverdale and Johnson, co-partners, in the state court, and after affirmation thereof on appeal, executions were issued thereon and subsequently returned to the effect that no property could be found in either case; thereafter this suit was commenced against the above named defendant.

A surety bond was furnished the contractors by defendant in support of a written contract of Coverdale and Johnson with the State of Montana for the performance of work and the furnishing of materials in improving the Augusta-Sun River highway for the sum of $15,615.66; the contract required the co-partners to furnish a surety bond in that amount on a form provided by the State Highway Commission. In the bond furnished the co-partners were named as principal and the defendant corporation as surety, and it was provided therein, among other things, that the principal would "in all respects faithfully perform all of the

provisions of said contract, and his, their, or its obligations thereunder including the specifications therein referred to and made a part thereof". There was incorporated in the agreement the following requirement: "The contractor shall carry public liability insurance to indemnify the public for injuries or damages [148] sustained by reason of the carrying on the work. This insurance shall be in the amount of at least $10,000.00 for one person and a total of $20,000.00 for one accident. The contractor shall submit adequate evidence to the Commission that he has taken out this insurance." Thereafter the defendant notified the Montana Highway Commission by letter that it had executed a bond covering the assured contractors and had issued Public Liability policy of $10,000.00 and $20,000.00. This letter seems to have been written following a letter from the Highway Commission to the co-partners calling attention to the public liability insurance requirement of the agreement, and requested a letter from the insurance agent who furnished the policy as the preferable form of evidence of compliance to be submitted to the Highway Commission. The evidence shows that neither the public liability insurance policy nor a copy thereof was ever submitted to the Highway Commission. The agreement in question contains requirements providing that the "agreement" the "Contract Bond" and "any and all supplemental agreements made or to be made are hereby made a part of these specifications and contract and are

to be considered one instrument." The contractors, Coverdale and Johnson, commenced work under their agreement on or about September 25th, 1934 and continued until about February 1st, 1935. On December 10th, 1934, E. O. Johnson, one of the co-partners, and one George Bardon, an employee, drove an automobile to Great Falls, accompanied by the two girls, Marguerite and Roberta Doheny, named in the title, whom they had invited to ride with them. The purpose of the trip to Great Falls was to deliver a two drum hoist which they had been using in performance of the contract and were returning according to their agreement. After delivering the hoist the four persons above named returned in the automobile towards Augusta, the home of the girls and the site where the work under the said contract was being performed. When they arrived near Simms, Montana, Bardon, who was driving for Johnson, turned off the highway and crashed into a tree, in what was alleged to be, a grossly negligent and reckless manner, and as a direct result thereof the two girls received severe injuries from which they later died.

Two actions were commenced in the District Court of Cascade County against the co-partnership. Co-partner Coverdale appeared and defended [149] the actions, claiming in defense that the girls' injuries and death were not the result of negligence in the performance or an act within the scope of the business of the co-partnership. The two cases were consolidated for trial and a verdict and judg-

ment rendered in favor of the administratrix of the estates of the deceased, in each case, for the sum of $5116.89, and upon appeal both judgments were affirmed; the same administratrix is the plaintiff in the instant cases. Executions on the two judgments were thereafter issued and returned by the Sheriff unsatisfied, and no part of the judgments, or either of them, has ever been paid. Thereafter the administratrix herein made written demands upon defendant, United States Fidelity and Guaranty Company, for payment of the judgments but no payment has ever been made.

In its answer defendant alleged that it had written a public liability insurance policy but that the policy contained an exclusion under which the driving or using of any vehicle or automobile was excepted from the coverage provided in said policy.

As it appears to the court there can be no question that the injuries and death of the two girls occurred in the manner set forth in the complaints and in the course of the carrying on of the work by the co-partners, Coverdale and Johnson, under their agreement with the State Highway Commission. The co-partnership was engaged in performing work under the agreement when the girls were injured. Much has been said about the alleged attempt on the part of defendant to conceal the facts relating to the public liability insurance policy in suit, and in fact the policy itself. Exactly what reason might have actuated the insurer or its representative in not making known the terms of the

policy to the State Highway Commission or the parties to the suit is not fully disclosed. Plaintiffs complain that the original policy was not produced until the trial of the present cases, and that until then they were without definite knowledge of its terms, and because of insurer's attitude in refusing information concerning its terms, they charge the insurer with the exercise of bad faith. In substance the insurer contends that the liability of the defendant company must be determined from the language of the policy without consideration of the agreement and bond pursuant to which the policy [150] was written and premium paid therefor. Plaintiffs contend that in signing the bond and issuing the policy pursuant to the terms of the agreement the defendant agreed to such terms and is bound thereby, and was acting with full knowledge with no waiver of requirements on the part of the Highway Commission, as is apparent from the letter written Coverdale and Johnson by the Highway Commission requiring them to furnish a policy according to the terms of the agreement, and thereafter the defendant by letter notified the Highway Commission it had issued the public liability policy. Although the policy, or a copy thereof, was never submitted to the Highway Commission, the letter from defendant to the Commission was evidently accepted as a statement that the policy conformed to the requirements of the agreement, as the copartners were thereafter allowed to proceed with

their work under their agreement with the Commission.

Plaintiffs rely, among other things, upon the rule that where several instruments are made at the same time in relation to the same subject matter they may be read together as one instrument and the recitals in the one may be limited by reference to the other. This rule may obtain even when the parties are not the same if the several instruments were known to all parties and were delivered at the same time to accomplish an agreed purpose. Here the parties, the State Highway Commission, the copartners and the defendant, were all interested in and familiar with the agreement and specifications and well knew the part to be performed by each to fulfill the specific requirements; one could not partially perform his part and expect to escape responsibility for his failure. There was nothing new or novel about this undertaking, the obligations were known and understood by all the parties and rested upon what appears to have been adequate consideration.

Defendant's counsel have presented able and exhaustive briefs covering the various phases of the case but none of the authorities examined by the court rest upon the same state of facts as are found here, and such differences seem to be material and to distinguish this case from the others relied upon.

The exclusion provisions relied upon by defendant to defeat recovery herein are so antagonistic to the requirements of the agreement, [151] and the

intent and purpose of its terms, as to render them wholly inoperative in the present cases, in the opinion of the court. The defendant as an insurer assumed the burden of protecting members of the public from injury and was paid its premium therefor, and having accepted the benefit should also accept the burden. (Sec. 8750 R. C. M.)

As a precaution and additional security for the protection of members of the public from injury in such a situation as appears to have arisen by reason of the failure of the defendant to do what the letter to the Highway Commission would indicate that it had done, this very comprehensive provision, heretofore referred to, was inserted in the agreement in question: "All things contained herein together with 'advertisement for proposals' or 'notice to contractors' and the contract bond as well as any papers attached to or bound with any of the above, also any and all supplemental agreements made or to be made, are hereby made a part of these specifications and contract and are to be considered one instrument."

It seems highly probable that the language: "any and all supplemental agreements made or to be made" would include a contract of public liability insurance such as is involved in this controversy, and make it one with the agreement which contained these comprehensive terms, and especially when the defendant and insurer had full knowledge and was in the business of writing such bonds and contracts of insurance, and knew what was expected

and required under the plain and specific language of the agreement, and was paid its price for doing so, and not for inserting exclusion provisions which would render the policy inoperative as to injuries most likely to occur.

It is also contended that the plaintiffs can not recover because the accident occurred some ten or twelve miles from a bridge under construction by the copartners; it appeared in evidence in the state court that the transactions under the contract were extended, or scattered, as the witness Bernstein said, over a distance of ten miles towards Great Falls and five miles towards Augusta. As to this particular question both the state District Court and the Supreme Court apparently found no objection.

Many authorities have been cited to sustain counsel in their [152] respective contentions; some of the following cases appear to have been relied upon by both sides: Peterson v. Miller Rubber Co., 24 F. (2) 59, 8th C. C. A.; Union Bank & Trust Co. v. Himmelbauer, 57 Mont. 438, 188 Pac. 940; Dodd v. Vucovich, 38 Mont. 188, 99 Pac. 296; Gary Hay & Grain Co., Inc. v. Carlson, 79 Mont. 111, 255 Pac. 722; 36 C. J., P. 1062, Sec. 14; Park Saddle Horse Co. v. Royal Indem. Co., 81 Mont. 99, 261 Pac. 880; Johnson v. Rocky Mountain Fire Insurance Co., 70 Mont. 411; National Surety Co. v. Ulmen, 68 Fed. (2) 330—the contract here contained no provision requiring the contractor to pay members of the public for injuries, in the present case the opposite is true; Whittaker v. U. S. Fidelity and Guaranty

Co., 300 Fed. 129; Secs. 7529, 7531, 7533, 7538, 7545, 10521, R. C. M.

The principles of law found in the authorities and statutory provisions cited seem to favor the plaintiffs. Under the construction given the policy, reading it as one with the agreement and bond, together with the evidence, reformation seems unnecessary, since it would mean the same in either event.

Not all of the specific arguments advanced in the voluminous briefs of counsel for the respective parties have been discussed here since it would result in an unnecessary extension of this opinion and apparently without a corresponding benefit either way, but the court has endeavored carefully to consider and weigh the many different angles of approach by counsel in their efforts to reach a favorable solution of the problems presented as affecting their respective interests. Bearing in mind the facts which appear to have been established, as plaintiffs contend, by a preponderance of the evidence, and the principles of law that ought to control, the court feels justified in the conviction that the plaintiffs ought to prevail in both of these cases, and that judgments should be entered accordingly, and it is so ordered, with costs.

Findings of ultimate facts and conclusions of law may be submitted in accordance with these views.

CHARLES N. PRAY
Judge

[Endorsed]: Filed Aug. 29, 1940. [153]

Thereafter, on September 6, 1940, Findings of Fact and Conclusions of Law were filed in each of said causes, and are in the words and figures following, to-wit: [154]

[Title of District Court and Cause.—No. 69.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above entitled cause having duly come on for trial on the 26th day of December, 1940, before the Court, Honorable Charles N. Pray, Judge presiding without a jury, the plaintiff appearing in person and by her counsel E. J. McCabe, and the defendant appearing by its counsel, Messrs. Toole and Boone, and oral and documentary evidence having been offered and admitted on behalf of the plaintiff and defendant, and the cause having been submitted to the Court for decision, and the Court having duly considered of the law and the evidence, finds as follows:

FINDINGS OF FACT

I.

That at all times hereinafter mentioned the defendant, United States Fidelity and Guaranty Company, was and still is a corporation created, organized and existing under and by virtue of the laws of the State of Maryland and authorized to do and doing business within the State of Montana.

II.

On or about the 8th day of April, 1935, plaintiff was, by an order of the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, appointed Administratrix of the Estate of Roberta Doheny, Deceased, by an order of said court, duly given, made and entered on said date in [155] the matter of the Estate of Roberta Doheny, Deceased, and thereafter letters of administration on the Estate of Roberta Doheny, deceased, were duly issued to plaintiff under the seal of said court and the hand of the Clerk of said court and that at all times since plaintiff has been and still is the duly appointed, qualified and acting administratrix of the Estate of Roberta Doheny, Deceased.

III.

On or about the 20th day of September, 1934, John M. Coverdale and E. O. Johnson, as co-partners, doing business under the firm name of Coverdale & Johnson, made and entered into a certain written agreement with the State of Montana for the performance by said co-partners of certain work and furnishing certain materials constituting improvements on a public highway known as the "Augusta-Sun River Road" in Lewis and Clark County, Montana, wherein and whereby the said co-partners promised and agreed to perform the work and furnish the materials in accordance with the terms of said contract in consideration of the pay-

ment to said co-partners by the State of Montana of the sum of approximately Fifteen Thousand, Six Hundred Fifteen and Sixty-six Hundredths Dollars ($15,615.66) in accordance with the terms of said agreement. That under the terms of said agreement the said co-partners promised and agreed to furnish a good and sufficient surety bond in the amount of $15,615.66 to be conditioned for the faithful performance of the covenants and agreements set forth in said agreement and to be by said co-partners performed and thereafter pursuant thereto the said co-partners, as Principal, and said United States Fidelity and Guaranty Company, as Surety, made, entered into and delivered to the State of Montana a certain written agreement designated "Contract Bond" which said agreement was conditioned for the faithful performance in all respects of the provisions of said contract by the said co-partners and recited the sum of $15,615.66 as the penalty thereof.

[156]

IV.

That under the terms and provisions of Paragraph 7.11 of section 7 of said written agreement between the aforesaid co-partners and the State of Montana for the performance of work and furnishing of materials described therein, the said co-partners promised and agreed to carry public liability insurance to indemnify the public for injuries or damages sustained by reason of the carrying on the work in the amount of at least $10,000.00 for one person and a total of $20,000.00 for one accident and

promised to submit adequate evidence to the State Highway Commission of the State of Montana of taking out such public liability insurance and thereafter as evidence of taking out of said public liability insurance the defendant United States Fidelity and Guaranty Company notified the Montana Highway Commission in writing on or about October 1st, 1934, that said defendant corporation had issued contractors' public liability insurance policy for said co-partners under said contract with a liability of $10,000.00 for one person and $20,000.00 for one accident. That plaintiff, prior to the commencement of the above entitled cause, demanded the original or a copy of said public liability insurance policy from the said co-partners and from the defendant, United States Fidelity and Guaranty Company, and said co-partners and said defendant failed to furnish either the said policy or a true copy thereof to plaintiff.

V.

That on the 12th day of December, 1934, and while carrying on the work mentioned and described in the aforesaid written agreement between the said co-partners and the State of Montana the aforesaid co-partners operated a certain automobile in such a grossly negligent and reckless manner as to injure and kill one Roberta Doheny and that at the time the said Roberta Doheny was a member of the public and said automobile was then and there being used in carrying on the work under aforesaid

agreement and that thereafter in [157] an action instituted in the District Court of the Eighth Judicial District of the State of Montana in and for the County of Cascade by the above named plaintiff and against the aforesaid co-partners to recover for the injuries and damages sustained by said Roberta Doheny and her resulting death as the proximate result of the reckless and grossly negligent operation of said automobile as aforesaid, a judgment in the sum of $5,116.89 was duly given, made and entered by said Court in favor of the said plaintiff and against the said co-partners on the 4th day of May, 1936, and that neither said judgment nor any part thereof has been paid by said co-partners or by the defendant, United States Fidelity and Guaranty Company, although demand of payment thereof has heretofore and prior to commencement of the above entitled action been made by plaintiff, upon said co-partners and said defendant.

VI.

That subsequent to the entry of aforesaid judgment the said co-partners appealed to the Supreme Court of the State of Montana from said judgment and thereafter on the 20th day of May, 1937, the judgment of the aforesaid District Court was affirmed and sustained by the Supreme Court of the State of Montana and remittitur on said judgment was issued by the Supreme Court to the aforesaid District Court and thereafter filed in said District Court on the 5th day of June, 1937. That neither said judgment nor any part thereof nor the interest

thereon has been paid and that plaintiff still is the owner and holder of said judgment.

VII.

That thereafter or on about the 17th day of August, 1937, an execution on said judgment was issued and placed in the hands of the Sheriff of Deer Lodge County, State of Montana, the place of residence and principal place of business of the aforesaid co-partners, requiring the Sheriff to satisfy aforesaid judgment out of the property of said co-partners and that said execution was returned to the District Court of Cascade County, on or about the [158] 10th day of September, 1937, unsatisfied and bearing the certificate of the Sheriff that he returned said execution wholly unsatisfied because no personal or real property of said co-partners could be found.

VIII.

The defendant United States Fidelity and Guaranty Company executed and delivered to the said co-partners a written public liability insurance policy bearing date October 1, 1934, and which was introduced in evidence by the defendant corporation and received in evidence as defendant's Exhibit 27 and which policy was written and issued by defendant as a purported compliance with the requirements of the written agreement with the State Highway Commission of Montana. The policy of insurance so written and delivered contains exclusion provisions which are antagonistic and con-

trary to the requirements of the aforesaid agreement with the State Highway Commission of the State of Montana, and such exclusion provisions were and are inoperative to defeat recovery in this action.

IX.

The defendant, United States Fidelity and Guaranty Company retained attorneys and paid in part the said attorneys for their services in conducting the defense by the co-partners of the action instituted in the District Court aforesaid, under a "non-waiver" agreement in writing and which is in evidence in this action.

X.

On or about May 13th, 1938, the said plaintiff demanded payment of the aforesaid judgment from the defendant, a true and correct copy of which written demand so made upon the said defendant is annexed to plaintiff's complaint on file in this action marked "Exhibit A".

XI.

That neither the insurance policy heretofore referred to nor a copy thereof was ever submitted or exhibited to the State of [159] Montana or the Highway Commission of Montana, and no information concerning its provisions was ever given to said State of Montana or said Highway Commission of said State except the notice referred to in above finding of fact IV.

Upon the foregoing findings of fact the Court makes the following

CONCLUSIONS OF LAW:

I.

That the plaintiff Ethel M. Doheny, as administratrix of the estate of Roberta Doheny, deceased, is entitled to the judgment of the above entitled Court in the above entitled action in her favor and against the defendant United States Fidelity and Guaranty Company in the sum of Five Thousand One Hundred Sixteen Dollars and Eighty-nine Cents ($5,116.89), together with interest on said sum from May 4, 1936 until paid at the rate of six per centum (6%) per annum, and plaintiff's costs incurred in said action.

CHARLES N. PRAY
Judge.

[Endorsed]: Filed Sept. 6, 1940. [160]

[Title of District Court and Cause—No. 70.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above entitled cause having duly come on for trial on the 26th day of December, 1940, before the Court, Honorable Charles N. Pray, Judge presiding without a jury, the plaintiff appearing in person and by her counsel E. J. McCabe, and the defendant appearing by its counsel, Messrs. Toole and Boone,

and oral and documentary evidence having been offered and admitted on behalf of the plaintiff and defendant, and the cause having been submitted to the Court for decision, and the Court having duly considered of the law and the evidence, finds as follows:

FINDINGS OF FACT:

I.

That at all times hereinafter mentioned the defendant, United States Fidelity and Guaranty Company, was and still is a corporation created, organized and existing under and by virtue of the laws of the State of Maryland and authorized to do and doing business within the State of Montana.

II.

On or about the 8th day of April, 1935, plaintiff was, by an order of the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, appointed Administratrix of the Estate of Marguerite Doheny, Deceased, by an order of said Court, duly given, made and entered on said date in [161] the matter of the Estate of Marguerite Doheny, Deceased, and thereafter letters of administration on the Estate of Marguerite Doheny, Deceased, were duly issued to plaintiff under the seal of said Court and the hand of the Clerk of said Court and that at all times since plaintiff has been and still is the duly appointed, qualified and acting administratrix of the Estate of Marguerite Doheny, Deceased.

III.

On or about the 20th day of September, 1934, John M. Coverdale and E. O. Johnson, as co-partners, doing business under the firm name of Coverdale & Johnson, made and entered into a certain written agreement with the State of Montana for the performance by said co-partners of certain work and furnishing certain materials constituting improvements on a public highway known as the "Augusta-Sun River Road" in Lewis and Clark County, Montana, wherein and whereby the said co-partners promised and agreed to perform the work and furnish the materials in accordance with the terms of said contract in consideration of the payment to said co-partners by the State of Montana of the sum of approximately Fifteen Thousand, Six Hundred Fifteen and Sixty-six Hundredths Dollars ($15,615.66) in accordance with the terms of said agreement. That under the terms of said agreement the said co-partners promised and agreed to furnish a good and sufficient surety bond in the amount of $15,615.66 to be conditioned for the faithful performance of the covenants and agreements set forth in said agreement and to be by said co-partners performed and thereafter pursuant thereto the said co-partners, as Principal, and said United States Fidelity and Guaranty Company, as Surety, made, entered into and delivered to the State of Montana a certain written agreement designated "Contract Bond" which said agreement was conditioned for the faithful performance in all re-

spects of the provisions of said contract by the said co-partners and recited the sum of $15,615.66 as the penalty thereof. [162]

IV.

That under the terms and provisions of Paragraph 7.11 of section 7 of said written agreement between the aforesaid co-partners and the State of Montana for the performance of work and furnishing of materials described therein, the said co-partners promised and agreed to carry public liability insurance to indemnify the public for injuries or damages sustained by reason of the carrying on the work in the amount of at least $10,000.00 for one person and a total of $20,000.00 for one accident and promised to submit adequate evidence to the State Highway Commission of the State of Montana of taking out such public liability insurance and thereafter as evidence of taking out of said public liability insurance the defendant United States Fidelity and Guaranty Company notified the Montana Highway Commission in writing on or about October 1st, 1934, that said defendant corporation had issued contractors' public liability insurance policy for said co-partners under said contract with a liability of $10,000.00 for one person and $20,000.00 for one accident. That plaintiff, prior to the commencement of the above entitled cause, demanded the original or a copy of said public liability insurance policy from the said co-partners and from the defendant, United States Fidelity and Guaranty

Company, and said co-partners and said defendant failed to furnish either the said policy or a true copy thereof to plaintiff.

V.

That on the 12th day of December, 1934, and while carrying on the work mentioned and described in the aforesaid written agreement between the said co-partners and the State of Montana the aforesaid co-partners operated a certain automobile in such a grossly negligent and reckless manner as to injure and kill one Marguerite Doheny and that at the time the said Marguerite Doheny was a member of the public and said automobile was then and there being used in carrying on the work under aforesaid agreement and that thereafter in [163] an action instituted in the District Court of the Eighth Judicial District of the State of Montana in and for the County of Cascade by the above named plaintiff and against the aforesaid co-partners to recover for the injuries and damages sustained by said Marguerite Doheny and her resulting death as the proximate result of the reckless and grossly negligent operation of said automobile as aforesaid, a judgment in the sum of $5,116.89 was duly given, made and entered by said Court in favor of the said plaintiff and against the said co-partners on the 4th day of May, 1936, and that neither said judgment nor any part thereof has been paid by said co-partners or by the defendant, United States Fidelity and Guaranty Company, although demand of

payment thereof has heretofore and prior to commencement of the above entitled action been made by plaintiff, upon said co-partners and said defendant.

VI.

That subsequent to the entry of aforesaid judgment the said co-partners appealed to the Supreme Court of the State of Montana from said judgment and thereafter on the 20th day of May, 1937, the judgment of the aforesaid District Court was affirmed and sustained by the Supreme Court of the State of Montana and remittitur on said judgment was issued by the Supreme Court to the aforesaid District Court and thereafter filed in said District Court on the 5th day of June, 1937. That neither said judgment nor any part thereof nor the interest thereon has been paid and that plaintiff still is the owner and holder of said judgment.

VII.

That thereafter on or about the 17th day of August, 1937, an execution on said judgment was issued and placed in the hands of the Sheriff of Deer Lodge County, State of Montana, the place of residence and principal place of business of the aforesaid co-partners, requiring the Sheriff to satisfy aforesaid judgment out of the property of said co-partners and that said execution was returned to the District Court of Cascade County, on or about the [164] 10th day of September, 1937, unsatisfied and bearing the certificate of the Sheriff

that he returned said execution wholly unsatisfied because no personal or real property of said co-partners could be found.

VIII.

The defendant United States Fidelity and Guaranty Company executed and delivered to the said co-partners a written public liability insurance policy bearing date October 1, 1934, and which was introduced in evidence by the defendant corporation and received in evidence as defendant's Exhibit 27 and which policy was written and issued by defendant as a purported compliance with the requirements of the written agreement with the State Highway Commission of Montana. The policy of insurance so written and delivered contains exclusion provisions which are antagonistic and contrary to the requirements of the aforesaid agreement with the State Highway Commission of the State of Montana, and such exclusion provisions were and are inoperative to defeat recovery in this action.

IX.

The defendant, United States Fidelity and Guaranty Company, retained attorneys and paid in part the said attorneys for their services in conducting the defense by the co-partners of the action instituted in the District Court aforesaid, under a "non-waiver" agreement in writing and which is in evidence in this action.

X.

On or about May 13th, 1938, the said plaintiff demanded payment of the aforesaid judgment from the defendant, a true and correct copy of which written demand so made upon the said defendant is annexed to plaintiff's complaint on file in this action marked "Exhibit A".

XI.

That neither the insurance policy heretofore referred to nor a copy thereof was ever submitted or exhibited to the State of [165] Montana or the Highway Commission of Montana, and no information concerning its provisions was ever given to said State of Montana or said Highway Commission of said State except the notice referred to in above finding of fact IV.

Upon the foregoing findings of fact the Court makes the following

CONCLUSIONS OF LAW:

I.

That the plaintiff Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, is entitled to the judgment of the above entitled Court in the above entitled action in her favor and against the defendant United States Fidelity and Guaranty Company in the sum of Five Thousand One Hundred Sixteen Dollars and Eighty-nine Cents ($5,116.89), together with interest on said sum from May 4, 1936 until paid at the

rate of six per centum (6%) per annum, and plaintiff's costs incurred in said action.

CHARLES N. PRAY
Judge.

[Endorsed]: Filed Sept. 6, 1940. [166]

Thereafter, on September 13, 1940, a Judgment was filed and entered in each of the causes herein, said Judgments being in the words and figures following, to wit: [167]

In the District Court of the United States for the District of Montana

(Great Falls Division)

No. 69

ETHEL M. DOHENY, as Administratrix of the Estate of Roberta Doheny, Deceased,
Plaintiff,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation,
Defendant.

JUDGMENT

Be it remembered, that the above entitled cause came on regularly for trial on the 26th day of December, 1939, before the Court sitting without a

jury, the plaintiff appearing in person and by her counsel of record, E. J. McCabe, and the defendant appearing by its counsel of record, Messrs. Toole and Boone, and evidence having been offered and admitted on the part of the plaintiff and defendant and the cause being duly submitted to the Court for decision; and the Court having heretofore duly made, adopted and filed Findings of Fact and Conclusions of Law herein, and the Court being now fully advised and the law and the facts having been considered:

Wherefore, by reason of the law and the premises it is ordered, adjudged and decreed that the plaintiff Ethel M. Doheny, as administratrix of the estate of Roberta Doheny, deceased, do have and recover from the defendant, United States Fidelity and Guaranty Company, a corporation, the sum of Six Thousand Four Hundred Fifty Dollars and Five Cents ($6,450.05) and interest on said sum from date hereof until paid at the rate of six percent (6%) per annum, together with plaintiff's costs herein taxed and allowed in the further sum of $39.30.

Done this 13th day of September, 1940.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed and entered Sept. 13, 1940.

[168]

In the District Court of the United States for the District of Montana

(Great Falls Division)

No. 70

ETHEL M. DOHENY, as Administratrix of the Estate of Marguerite Doheny, Deceased,

Plaintiff,

vs.

UNITED STATES FIDELITY and GUARANTY COMPANY, a Corporation,

Defendant.

JUDGMENT

Be it remembered, that the above entitled cause came on regularly for trial on the 26th day of December, 1939, before the Court sitting without a jury, the plaintiff appearing in person and by her counsel of record, E. J. McCabe, and the defendant appearing by its counsel of record, Messrs. Toole and Boone, and evidence having been offered and admitted on the part of the plaintiff and defendant and the cause being duly submitted to the Court for decision; and the Court having heretofore duly made, adopted and filed Findings of Fact and Conclusions of Law herein, and the Court being now fully advised and the law and the facts having been considered:

Wherefore, by reason of the law and the premises it is ordered, adjudged and decreed that the plaintiff Ethel M. Doheny, as administratrix of the estate

of Marguerite Doheny, deceased, do have and recover from the defendant, United States Fidelity and Guaranty Company, a corporation, the sum of Six Thousand Four Hundred Fifty Dollars and Five Cents ($6,450.05) and interest on said sum from date hereof until paid at the rate of six percent (6%) per annum, together with plaintiff's costs herein taxed and allowed in the further sum of $28.50.

Done this 13th day of September, 1940.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed and entered Sept. 13, 1940.
[169]

Thereafter, on September 14, 1940, a Notice of Entry of Judgment was filed in each of the causes herein, and are in the words and figures following, to wit: [170]

[Title of District Court and Cause—No. 69.]

NOTICE OF ENTRY OF JUDGMENT

To the above named Defendant and to Messrs. Toole and Boone, its attorneys of record.

You will please take notice that in the above entitled cause judgment was duly given, made and entered on the 13th day of September, 1940, by the above Court in favor of the plaintiff and against the defendant wherein and whereby it was duly ad-

judged that said plaintiff do have and recover against the defendant the sum of $6,450.05, with interest thereon at the rate of six percent (6%) per annum until paid, and costs of plaintiff in said action.

Dated September 13, 1940.

E. J. McCABE,
Attorney for Plaintiff.

Served by mail on Sept. 13, 1940.

[Endorsed]: Filed Sept. 14, 1940. [171]

[Title of District Court and Cause—No. 70.]

NOTICE OF ENTRY OF JUDGMENT

To the above named Defendant and to Messrs. Toole and Boone, its attorneys of record:

You will please take notice that in the above entitled cause judgment was duly given, made and entered on the 13th day of September, 1940, by the above Court in favor of the plaintiff and against the defendant wherein and whereby it was duly adjudged that said plaintiff do have and recover against the defendant the sum of $6,450.05, with interest thereon at the rate of six percent (6%) per annum until paid, and costs of plaintiff in said action.

Dated September 13, 1940.

E. J. McCABE,
Attorney for Plaintiff.

Served by mail on Sept. 13, 1940.

[Endorsed]: Filed Sept. 14, 1940. [172]

Thereafter, on September 17, 1940, a Notice of Appeal was filed in each of the causes herein, and are in the words and figures following, to wit: [173]

[Title of District Court and Cause—No. 69.]

NOTICE OF APPEAL

To Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, plaintiff herein, and to E. J. McCabe, Attorney for Plaintiff:

You and each of you will please hereby take notice that the United States Fidelity and Guaranty Company, a corporation, the defendant in the above entitled action, does hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from that certain judgment made, entered and filed in the above entitled action on the 13th day of September, 1940, wherein the plaintiff, Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, was given judgment against the defendant, United States Fidelity and Guaranty Company, a corporation, in the sum of Six Thousand Four Hundred Fifty and 05/100 Dollars ($6450.05) with interest thereon at the rate of six per cent (6%) per annum from September 13, 1940, together with plaintiff's costs of action taxed in the sum of Thirty-nine and 30/100 Dollars ($39.30). [174]

You will further please take notice that this appeal is taken from said judgment and from the whole thereof.

Dated this 17th day of September, 1940.

HOWARD TOOLE,
W. T. BOONE,
Attorneys for Appellant, United States Fidelity and Guaranty Company, a corporation.

[Endorsed]: Filed Sept. 17, 1940. [175]

[Title of District Court and Cause—No. 70.]

NOTICE OF APPEAL

To Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, plaintiff herein, and to E. J. McCabe, Attorney for Plaintiff:

You and each of you will please hereby take notice that the United States Fidelity and Guaranty Company, a corporation, the defendant in the above entitled action, does hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from that certain judgment made, entered and filed in the above entitled action on the 13th day of September, 1940, wherein the plaintiff, Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, was given judgment against the defendant, United States Fidelity and Guaranty Company, a corporation, in the sum of Six Thousand Four Hundred fifty and 05/100 Dollars ($6450.05) with

interest thereon at the rate of six per cent (6%) per annum from September 13, 1940, together with plaintiff's costs of action taxed in the sum of Twenty-eight and 50/100 Dollars ($28.50). [176]

You will further please take notice that this appeal is taken from said judgment and from the whole thereof.

Dated this 17th day of September, 1940.

HOWARD TOOLE,
W. T. BOONE,
Attorneys for Appellant, United States Fidelity and Guaranty Company, a corporation.

[Endorsed]: Filed Sept. 17, 1940. [177]

Thereafter, on September 17, 1940, a copy of each notice of appeal, filed in each cause herein, was mailed to counsel for Plaintiff in each case, the docket record of the Clerk being as follows, to wit:

Sept. 17, 1940. Mailed copy notice of appeal to counsel for Plaintiff. [178]

Thereafter, on September 17, 1940, a Bond, (Supersedeas), was filed in each of the causes herein, said bonds being in the words and figures following, to wit: [179]

[Title of District Court and Cause—No. 69.]

BOND

Know all men by these presents, that we, the undersigned, United States Fidelity and Guaranty Company, a corporation, as principal, and Maryland Casualty Company, a corporation, duly qualified and authorized to execute bonds and undertakings and to act as surety within the State and District of Montana, as surety, are held and firmly bound unto Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, the plaintiff above named, in the full sum of Seven Thousand Dollars ($7000.00), to be paid to the said plaintiff, her successors or assigns, to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents. [180]

Sealed with our seals and dated this 16th day of September, 1940.

The condition of this obligation is such that whereas, in the District Court of the United States in and for the District of Montana, in the above entitled action, pending in said Court, wherein Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, is plaintiff and United States Fidelity and Guaranty Company, a corporation, is defendant, a judgment was rendered against the defendant, United States Fidelity and Guaranty Company, a corporation, in the amount of Six Thousand Four Hundred fifty and 05/100 Dollars

($6450.05) which judgment was made and entered on the 13th day of September, 1940, and

Whereas, the defendant, United States Fidelity and Guaranty Company, a corporation, has filed in said action its notice of appeal from said judgment to the Circuit Court of Appeals of the United States for the Ninth Circuit, and said defendant proposes to prosecute said appeal to reverse said judgment and desires that execution thereon be stayed pending determination of said appeal;

Now, therefore, in consideration of said appeal and the said supersedeas, if the above named United States Fidelity and Guaranty Company, a corporation, as such defendant shall prosecute its appeal to effect or [181] shall pay said judgment and answer all damages, interest and costs, if it fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
a corporation,

(Seal) By DON W. JACOBUS,
Attorney-in-Fact,
Principal.

MARYLAND CASUALTY COMPANY, a corporation,

(Seal) By JOHN W. SCHROEDER,
Its Attorney-in-Fact, thereunto duly authorized,
Surety.

JOHN W. SCHROEDER,
Montana Resident Agent.

The within bond is hereby approved this 17th day of September, 1940.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed Sept. 17, 1940. [182]

[Title of District Court and Cause—No. 70.]

BOND

Know all men by these presents, that we, the undersigned, United States Fidelity and Guaranty Company, a corporation, as principal, and Maryland Casualty Company, a corporation, duly qualified and authorized to execute bonds and undertakings and to act as surety within the State and District of Montana, as surety, are held and firmly bound unto Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, the plaintiff above named, in the full sum of Seven Thousand Dollars ($7000.00), to be paid to the said plaintiff, her successors or assigns, to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents. [183]

Sealed with our seals and dated this 16th day of September, 1940.

The condition of this obligation is such that whereas, in the District Court of the United States in and for the District of Montana, in the above entitled action, pending in said Court, wherein Ethel M. Doheny, as Administratrix of the Estate of Mar-

guerite Doheny, Deceased, is plaintiff and United States Fidelity and Guaranty Company, a corporation, is defendant, a judgment was rendered against the defendant, United States Fidelity and Guaranty Company, a corporation, in the amount of Six Thousand Four Hundred fifty and 05/100 Dollars ($6450.05) which judgment was made and entered on the 13th day of September, 1940, and

Whereas, the defendant, United States Fidelity and Guaranty Company, a corporation, has filed in said action its notice of appeal from said judgment to the Circuit Court of Appeals of the United States for the Ninth Circuit, and said defendant proposes to prosecute said appeal to reverse said judgment and desires that execution thereon be stayed pending determination of said appeal;

Now, therefore, in consideration of said appeal and the said supersedeas, if the above named United States Fidelity and Guaranty Company, a corporation, as such defendant shall prosecute its appeal to effect or [184] shall pay said judgment and answer all damages, interest and costs, if it fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

UNITED STATES FIDELITY
AND GUARANTY COMPANY,
a corporation,

(Seal) By DON W. JACOBUS
Attorney-in-Fact,
Principal.

MARYLAND CASUALTY
COMPANY, a corporation,
(Seal) By JOHN W. SCHROEDER
Its Attorney-in-Fact,
thereunto duly authorized
Surety.

JOHN W. SCHROEDER,
Montana Resident Agent.

The within bond is hereby approved this 17th day of September, 1940.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed September 17, 1940. [185]

Thereafter, on September 17, 1940, a copy of Bond on Appeal, (Supersedeas), in each case, was mailed to counsel for plaintiff, in each case, the Clerk's docket record of said mailing being as follows, to wit:

Sept. 17, 1940, mailed copy of Bond on Appeal (Supersedeas), to counsel for plaintiff. [186]

Thereafter, on October 10, 1940, a Designation of Contents of Record on Appeal was duly filed herein, being in the words and figures following, to wit:

[187]

[Title of District Court and Causes.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL OF DEFENDANT UNITED STATES FIDELITY AND GUARANTY COMPANY

Whereas, the above entitled causes were consolidated for trial and were, on the 26th day of December, 1939, tried as consolidated cases, and

Whereas, United States Fidelity and Guaranty Company, the defendant in each of the above entitled actions, has filed a Notice of Appeal, in each of the above cases, to the Circuit [188] Court of Appeals of the Ninth Circuit from a judgment, rendered in each of the above entitled actions on the 13th day of September, 1940,

Now, therefore, the said appellant in each of the above entitled causes, does hereby designate the following portions of the record, proceedings and evidence to be contained in the consolidated record of the above entitled causes on appeal:

In Cause No. 69, Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, Plaintiff, vs. United States Fidelity and Guaranty Company, a corporation, Defendant.

1. Plaintiff's complaint, including the verification, and Exhibit "A" thereunto attached.

2. Certified copy of the record in this action on removal from the state court to the Federal Court embracing:

(a) The plaintiff's complaint (copy to be here omitted as the same is heretofore set out in full).

(b) Summons, together with the return showing service.

(c) Verified petition for removal.

(*c*) Notice of petition and bond for removal.

(e) Bond for costs on removal.

(f) Order of removal.

(g) Clerk's certificate to transcript of record on removal.

3. Defendant's motion to dismiss (omitting title of court and cause). [189]

4. Defendant's motion to strike (omitting title of court and cause).

5. Order of the Court denying defendant's motion to strike and defendant's motion to dismiss.

6. Defendant's answer (omitting title of court and cause).

7. The transcript of the proceedings at the trial of said cause including the following exhibits: The material portions of exhibit 1 on deposition; all of exhibits 2, 3 and 4 on deposition; all of exhibits 9, 21, 27 and 28; and the material portions of exhibit 26; all as contained in said transcript.

8. Written opinion of the court (omitting title of court and cause).

9. Court's findings of fact and conclusions of law (omitting title of court and cause).

10. Judgment.

11. Notice of entry of judgment (omitting title of court and cause).

12. Notice of appeal with date of filing (omitting title of court and cause).

13. Supersedeas bond on appeal (omitting title of court and cause but including Court's approval of the bond).

14. Entry in civil docket as to names of parties to whom Clerk mailed copies of notice of appeal and supersedeas bond, with date of mailing.

15. Designation of contents of record on appeal.

16. Statement of points on which appellant intends to rely on the appeal (omitting title of district court and cause). [190]

In Cause No. 70, Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, Plaintiff, vs. United States Fidelity and Guaranty Company, a corporation, Defendant.

1. Plaintiff's complaint, including the verification, and Exhibit "A" thereunto attached.

2. Certified copy of the record in this action on removal from the state court to the Federal Court embracing:

(a) The plaintiff's complaint (copy to be here omitted as the same is heretofore set out in full).

(b) Summons, together with the return showing service.

(c) Verified petition for removal.

(d) Notice of petition and bond for removal.

(e) Bond for costs on removal.

(f) Order of removal.

(g) Clerk's certificate to transcript of record on removal.

3. Defendant's motion to dismiss (omitting title of court and cause).

4. Defendant's motion to strike (omitting title of court and cause).

5. Order of the Court denying defendant's motion to strike and defendant's motion to dismiss.

6. Defendant's answer (omitting title of court and cause).

7. The transcript of the proceedings at the trial of said cause including the following exhibits: The material portions of exhibit 1 on deposition; all of exhibits 2, 3 and [191] 4 on deposition; all of exhibits 9, 21, 27 and 28; and the material portions of exhibit 26; all as contained in said transcript (copy to be here omitted as the same is heretofore set out in full).

8. Written opinion of the court (copy to be here omitted as the same is heretofore set out in full.)

9. Court's findings of fact and conclusions of law (omitting title of court and cause).

10. Judgment.

11. Notice of entry of judgment (omitting title of court and cause).

12. Notice of appeal with date of filing (omitting title of court and cause).

13. Supersedeas bond on appeal (omitting title of court and cause but including Court's approval of the bond).

14. Entry in civil docket as to names of parties to whom Clerk mailed copies of notice of appeal and supersedeas bond, with date of mailing.

15. Designation of contents of record on appeal (copy to be here omitted as the same is heretofore set out in full).

16. Statement of points on which appellant intends to rely on the appeal (copy to be here omitted as the same is heretofore set out in full).

Dated this 10th day of October, 1940.

HOWARD TOOLE,
W. T. BOONE,
Attorneys for defendant in each of the above entitled causes. [192]

Service acknowledged at Great Falls, Montana, October 10th, 1940.

E. J. McCABE,
Attorney for plaintiff in each of the above entitled causes.

[Endorsed]: Filed Oct. 10, 1940. [193]

Thereafter, on October 10, 1940, a Statement of Points was duly filed herein, being in the words and figures following, to wit: [194]

[Title of District Court and Causes.]

STATEMENT OF POINTS

Now comes the United States Fidelity and Guaranty Company, appellant in the above entitled actions, heretofore consolidated for trial, and having designated less than the complete record for inclusion in the record on appeal, herewith designates and states the points on which it intends to rely on the appeal in the consolidated actions as follows: [195]

I.

In the appeal in these actions the appellant, United States Fidelity and Guaranty Company, will rely upon the point that Contractors' Public Liability Policy issued by it as insurer to Coverdale & Johnson as insured (defendant's exhibit 27, pages 54 to 79, inclusive, of the typewritten transcript) was a clear and unambiguous contract of insurance which should have been construed by the court without recourse to extrinsic evidence and that the court was in error:

(a) In denying defendant's motion to dismiss the complaint which motion was made upon the ground that the said complaint fails to state a claim upon which relief can be granted.

(b) In denying defendant's motion to strike that part of paragraph III of plaintiff's complaint from and including the word "that" on line 14 to and including the word "thereof" on line 25, all on page 2, said motion to strike being based upon the ground that the said portion of paragraph III above referred to was and is redundant, immaterial, impertinent and surplusage.

(c) In admitting plaintiff's exhibit 1 on deposition (the pertinent portions of said exhibit 1 appearing in the typewritten transcript, pages 14 to 28) said exhibit 1 being the contract between the State of Montana and Coverdale & Johnson for the [196] construction of certain highway bridges on Federal Aid Project No. NRH-176 "E", Unit 2, in Lewis and Clark County, Montana.

(d) In admitting plaintiff's exhibit 2 on deposition (typewritten transcript, pages 28 to 32) said exhibit 2 being the contract bond furnished by United States Fidelity and Guaranty Company to Coverdale & Johnson to guarantee the faithful performance and completion of the contract for the construction of said bridges.

(e) The court was in error in admitting plaintiff's exhibit 3 on deposition (typewritten transcript, pages 36 and 37) which exhibit 3 is a letter from the State Highway Commission of the State of Montana to Coverdale & Johnson wherein reference is made to the bridge contract

(plaintiff's exhibit 1 on deposition) and the performance bond (plaintiff's exhibit 2 on deposition) and also referring to the Contractors' Public Liability Policy (defendant's exhibit 27).

(f) In admitting plaintiff's exhibit 4 on deposition (typewritten transcript, page 39) which exhibit 4 on deposition is a letter from United States Fidelity and Guaranty Company to the State Highway Commission of the State of Montana referring [197] to said Contractors' Public Liability Policy (defendant's exhibit 27).

(g) The court was in error in its Findings of Fact Nos. III, IV and VIII in each of said causes in resorting to the contract (plaintiff's exhibit 1 on deposition) and the bond (plaintiff's exhibit 2 on deposition) and the letter from the Montana Highway Commission to Coverdale & Johnson (plaintiff's exhibit 3 on deposition) and the letter from the United States Fidelity and Guaranty Company to the State Highway Commission of the State of Montana (plaintiff's exhibit 4 on deposition) and in resorting to the evidence of the witness W. O. Whipps (typewritten transcript, pages 12 to 41, inclusive) for the purpose of construing the Contractors' Public Liability Policy (defendant's exhibit 27) in that there was no ambiguity or uncertainty in respect to said policy justifying a resort to extrinsic evidence.

(h) The court was in error in Finding of

Fact No. VIII in each of said causes wherein the court found as follows:

> "The defendant United States Fidelity and Guaranty Company executed and delivered to the said co-partners a written public liability insurance policy bearing date October 1, 1934, and which was [198] introduced in evidence by the defendant corporation and received in evidence as defendant's Exhibit 27 and which policy was written and issued by defendant as a purported compliance with the requirements of the written agreement with the State Highway Commission of Montana. The policy of insurance so written and delivered contains exclusion provisions which are antagonistic and contrary to the requirements of the aforesaid agreement with the State Highway Commission of the State of Montana, and such exclusion provisions were and are inoperative to defeat recovery in this action."

II.

The appellant will raise the point on appeal that the Contractors' Public Liability Policy issued by the defendant, United States Fidelity and Guaranty Company, to Coverdale & Johnson did not cover any risk or risks excepting such as should arise by reason of and during the progress of the work described in said policy and covered thereby and that therefore there was no sufficient or competent evidence in the record to justify the court

in making that portion of its Finding of Fact No. V in each of said causes of action reading as follows:

> "That on the 12th day of December, 1934, and while carrying on the work mentioned and described in the aforesaid written agreement between the said co-partners and the State of Montana the aforesaid co-partners operated a certain automobile in such a grossly negligent and reckless manner as to injure and kill one Roberta Doheny (Marguerite Doheny) and that at the time the said Roberta Doheny (Marguerite Doheny) was a member of the public and said automobile was then and there being used in carrying on the work under the aforesaid agreement * * *" [199]

III.

The appellant will raise the point on appeal that the Contractors' Public Liability Policy issued by the defendant, United States Fidelity and Guaranty Company, to Coverdale & Johnson excluded risks arising out of the operation of the automobile in these cases and that there was no sufficient evidence in the record to justify the court in making its Finding of Fact No. V in each of said causes of action reading as follows:

> "That on the 12th day of December, 1934, and while carrying on the work mentioned and described in the aforesaid written agreement between the said co-partners and the State of

Montana the aforesaid co-partners operated a certain automobile in such a grossly negligent and reckless manner as to injure and kill one Roberta Doheny (Marguerite Doheny) and that at the time the said Roberta Doheny (Marguerite Doheny) was a member of the public and said automobile was then and there being used in carrying on the work under aforesaid agreement and that thereafter in an action instituted in the District Court of the Eighth Judicial District of the State of Montana in and for the County of Cascade by the above named plaintiff and against the aforesaid co-partners to recover for the injuries and damages sustained by said Roberta Doheny (Marguerite Doheny) and her resulting death as the proximate result of the reckless and grossly negligent operation of said automobile as aforesaid, a judgment in the sum of $5,116.89 was duly given, made and entered by said Court in favor of the said plaintiff and against the said co-partners on the 4th day of May, 1936, and that neither said judgment nor any part thereof has been paid by said co-partners or by the defendant, United States Fidelity and Guaranty Company, although demand of payment thereof has heretofore and prior to commencement of the above entitled action been made by plaintiff, upon said co-partners and said defendant." [200]

IV.

The appellant will raise the point on appeal that the Contractors' Public Liability Policy issued by the United States Fidelity and Guaranty Company to Coverdale & Johnson (defendant's exhibit No. 27) was a clear and unambiguous contract of insurance which should have been construed by the court without recourse to extrinsic evidence and that by reason of the failure of the plaintiff in the court below to request or plead a reformation of said policy and notwithstanding the fact that no issue of reformation thereof was made or raised at any time in the pleadings or in the trial of said actions the court was in error:

(a) In that in Finding of Fact No. VIII in each of said causes of action the court disregarded the exclusions in the policy and in effect reformed the same as follows:

"The policy of insurance so written and delivered contains exclusion provisions which are antagonistic and contrary to the requirements of the aforesaid agreement with the State Highway Commission of the State of Montana, and such exclusion provisions were and are inoperative to defeat recovery in this action."

(b) In that it apears from the written opinion of the trial court that the provisions of the Contractors' Public Liability Policy were construed together with the contract (plaintiff's exhibit 1 on deposition), the bond (plaintiff's

exhibit 2 on deposition), the letter from the [201] Montana Highway Commission to Coverdale & Johnson (plaintiff's exhibit 3 on deposition), the letter from the United States Fidelity and Guaranty Company to the State Highway Commission of the State of Montana (plaintiff's exhibit 4 on deposition) and with the evidence of W. O. Whipps, all of which is summed up in the statement of the court on the last page of the typewritten opinion in the following language:

> "Under the construction given the policy, reading it as one with the agreement and bond, together with the evidence, reformation seems unnecessary, since it would mean the same in any event."

V.

By filing this statement of points the appellant in each of said causes does not intend to waive the right to urge error upon any of the rulings or findings of the trial court resulting in a judgment in each of said causes in favor of the plaintiff and against the defendant.

Dated this 10th day of October, 1940.

HOWARD TOOLE
W. T. BOONE
Attorneys for defendant in each of the above entitled causes. [202]

Service acknowledged at Great Falls, Montana, October 10th, 1940.

E. J. McCABE
Attorney for plaintiff in each of the above entitled causes.

[Endorsed]: Filed Oct. 10, 1940. [203]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

United States of America,
District of Montana—ss:

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to The Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 204 pages, numbered consecutively from 1 to 204 inclusive, constitute a full, true and correct transcript of all portions of the record in Case No. 69, Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, vs. United States Fidelity and Guaranty Company, a corporation, and in case No. 70, Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, vs. United States Fidelity and Guaranty Company, a corporation, designated by the parties as the record on appeal therein, except the Summons called for in said designation, there being no Summons or certified copy thereof on file in this court, as ap-

pears from the original records and files of said court in my custody as such Clerk.

I further certify that the costs of said transcript amount to the sum of Forty-one and 10/100ths Dollars ($41.10) and have been paid by the appellants.

Witness my hand and the seal of said court at Great Falls, Montana, this 23rd day of October, A. D. 1940.

(Seal) C. R. GARLOW,
Clerk U. S. District Court,
District of Montana.
By C. G. KEGEL
Deputy Clerk. [204]

[Title of District Court and Cause.]

ORDER OF TRANSMISSION OF ORIGINAL EXHIBITS.

Upon application of counsel for United States Fidelity and Guaranty Company, a corporation, the defendant in each of the above entitled actions,

It Is Hereby Ordered, That in connection with the appeal of the said defendant, United States Fidelity and Guaranty Company, a corporation, in each of the above entitled actions to the United States Circuit Court of Appeals for the Ninth Circuit, the following original exhibits introduced in evidence at the trial of said causes as consolidated

by the court, may be transmitted to the Appellate Court for its inspection:

Plaintiff's Exhibits 1, 2, 3, and 4, all on deposition,

Plaintiff's exhibit No. 26, and

Defendant's exhibits Nos. 27 and 28.

Dated, this 26th day of October, 1940.

CHARLES N. PRAY
Judge of the United States District Court, District of Montana.

[Endorsed]: Filed and entered October 26, 1940.

United States of America,
District of Montana—ss.

I, C. R. Garlow, Clerk of the United States District Court in and for the.....District of Montana, do hereby certify that the annexed and foregoing is a true and full copy of the original Order of Transmission of Original Exhibits, filed and entered in Civil Actions Numbers 69 and 70, entitled: Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, deceased, vs. United States Fidelity and Guaranty Company, a corporation; and Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, vs. United States Fidelity and Guaranty Company, a corporation, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Great Falls this 26th day of October, A. D. 1940.

(Seal) C. R. GARLOW,
Clerk.
By C. G. KEGEL
Deputy Clerk.

[Endorsed]: No. 9668. United States Circuit Court of Appeals for the Ninth Circuit. United States Fidelity and Guaranty Company, a corporation, Appellant, vs. Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, Appellee. and United States Fidelity and Guaranty Company, a Corporation, Appellant, vs. Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, Appellee. Transcript of Record. Upon Appeals from the District Court of the United States for the District of Montana.

Filed October 26, 1940.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 9668

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,
Appellant,

vs.

ETHEL M. DOHENY, as Administratrix of the Estate of Roberta Doheny, Deceased,
Appellee,

and

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,
Appellant,

vs.

ETHEL M. DOHENY, as Administratrix of the Estate of Marguerite Doheny, Deceased,
Appellee.

To the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit:

I.

DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED

You will please be advised that the appellant, United States Fidelity and Guaranty Company, a corporation, in each of the above causes, does hereby designate for printing in the consolidated appeal of

the above cases the entire transcript of the record forwarded to you by the Clerk of the United States Court for the District of Montana in the above entitled actions and that the said appellant, in the consolidated appeal of the above entitled causes, will rely upon the entire record in this appeal.

You will please further be advised that said appellant has taken a separate appeal in each of the above causes but that the same record, being a consolidated record, will serve in each of said appeals.

II.

STATEMENT OF POINTS ON WHICH THE APPELLANT INTENDS TO RELY ON APPEAL.

Whereas, United States Fidelity and Guaranty Company, a corporation, has filed separate notices of appeal and is taking separate appeals to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment rendered in each of the above entitled actions in the District Court of the United States for the District of Montana, on the 13th day of September, 1940, and

Whereas, a consolidated record on appeal, in the above entitled causes, has been filed in said Circuit Court of Appeals,

Now, Therefore, the said appellant does hereby make and file this statement of the points on which it intends to rely on appeal of the above entitled actions, such statement being filed for both of the above entitled causes by reason of the fact that the

same points will be raised by the said appellant in each of the above entitled causes.

1. In the appeal in these actions the appellant, United States Fidelity and Guaranty Company, will rely upon the point that Contractors' Public Liability Policy issued by it as insurer to Coverdale & Johnson as insured (defendant's exhibit 27, pages 54 to 79, inclusive, of the typewritten transcript) was a clear and unambiguous contract of insurance which should have been construed by the court without recourse to extrinsic evidence and that the court was in error:

(a) In denying defendant's motion to dismiss the complaint which motion was made upon the ground that the said complaint fails to state a claim upon which relief can be granted.

(b) In denying defendant's motion to strike that part of paragraph III of plaintiff's complaint from and including the word "that" on line 14 to and including the word "thereof" on line 25, all on page 2, said motion to strike being based upon the ground that the said portion of paragraph III above referred to was and is redundant, immaterial, impertinent and surplusage.

(c) In admitting plaintiff's exhibit 1 on deposition (the pertinent portions of said exhibit appearing in the typewritten transcript, pages 14 to 28) said exhibit 1 being the contract

between the State of Montana and Coverdale & Johnson for the construction of certain highway bridges on Federal Aid Project No. NRH-176 "E", Unit 2, in Lewis and Clark County, Montana.

(d) In admitting plaintiff's exhibit 2 on deposition (typewritten transcript, pages 28 to 32) said exhibit 2 being the contract bond furnished by United States Fidelity and Guaranty Company to Coverdale & Johnson to guarantee the faithful performance and completion of the contract for the construction of said bridges.

(e) The court was in error in admitting plaintiff's exhibit 3 on deposition (typewritten transcript, pages 36 and 37) which exhibit 3 is a letter from the State Highway Commission of the State of Montana to Coverdale & Johnson wherein reference is made to the bridge contract (plaintiff's exhibit 1 on deposition) and the performance bond (plaintiff's exhibit 2 on deposition) and also referring to the Contractors' Public Liability Policy (defendant's exhibit 27).

(f) In admitting plaintiff's exhibit 4 on deposition (typewritten transcript, page 39) which exhibit 4 on deposition is a letter from United States Fidelity and Guaranty Company to the State Highway Commission of the State of Montana referring to said Contractors' Public Liability Policy (defendant's exhibit 27).

(g) The court was in error in its Findings

of Fact Nos. III, IV and VIII in each of said causes in resorting to the contract (plaintiff's exhibit 1 on deposition) and the bond (plaintiff's exhibit 2 on deposition) and the letter from the Montana Highway Commission to Coverdale & Johnson (plaintiff's exhibit 3 on deposition) and the letter from the United States Fidelity and Guaranty Company to the State Highway Commission of the State of Montana (plaintiff's exhibit 4 on deposition) and in resorting to the evidence of the witness W. O. Whipps (typewritten transcript, pages 12 to 41, inclusive) for the purpose of construing the Contractors' Public Liability Policy (defendant's exhibit 27) in that there was no ambiguity or uncertainty in respect to said policy justifying a resort to extrinsic evidence.

(h) The court was in error in Finding of Fact No. VIII in each of said causes wherein the court found as follows:

> "The defendant United States Fidelity and Guaranty Company executed and delivered to the said co-partners a written public liability insurance policy bearing date October 1, 1934, and which was introduced in evidence by the defendant corporation and received in evidence as defendant's Exhibit 27 and which policy was written and issued by defendant as a purported compliance with the requirements of the written agreement with the State Highway Commission of Mon-

tana. The policy of insurance so written and delivered contains exclusion provisions which are antagonistic and contrary to the requirements of the aforesaid agreement with the State Highway Commission of the State of Montana, and such exclusion provisions were and are inoperative to defeat recovery in this action."

2. The appellant will raise the point on appeal that the Contractors' Public Liability Policy issued by the defendant, United States Fidelity and Guaranty Company, to Coverdale & Johnson did not cover any risk or risks excepting such as should arise by reason of and during the progress of the work described in said policy and covered thereby and that therefore there was no sufficient or competent evidence in the record to justify the court in making that portion of its Finding of Fact No. V in each of said causes of action reading as follows:

"That on the 12th day of December, 1934, and while carrying on the work mentioned and described in the aforesaid written agreement between the said co-partners and the State of Montana the aforesaid co-partners operated a certain automobile in such a grossly negligent and reckless manner as to injure and kill one Roberta Doheny (Marguerite Doheny) and that at the time the said Roberta Doheny (Marguerite Doheny) was a member of the public and said automobile was then and there being

used in carrying on the work under the aforesaid agreement . . . ."

3. The appellant will raise the point on appeal that the Contractors' Public Liability Policy issued by the defendant, United States Fidelity and Guaranty Company, to Coverdale & Johnson excluded risks arising out of the operation of the automobile in these cases and that there was no sufficient evidence in the record to justify the court in making its Findings of Fact No. V in each of said causes of action reading as follows:

"That on the 12th day of December, 1934, and while carrying on the work mentioned and described in the aforesaid written agreement between the said co-partners and the State of Montana the aforesaid co-partners operated a certain automobile in such a grossly negligent and reckless manner as to injure and kill one Roberta Doheny (Marguerite Doheny) and that at the time the said Roberta Doheny (Marguerite Doheny) was a member of the public and said automobile was then and there being used in carrying on the work under aforesaid agreement and that thereafter in an action instituted in the District Court of the Eighth Judicial District of the State of Montana in and for the County of Cascade by the above named plaintiff and against the aforesaid co-partners to recover for the injuries and damages sustained by said Roberta Doheny (Marguerite Doheny) and her resulting death as the proxi-

mate result of the reckless and grossly negligent operation of said automobile as aforesaid, a judgment in the sum of $5,116.89 was duly given, made and entered by said Court in favor of the said plaintiff and against the said co-partners on the 4th day of May, 1936, and that neither said judgment nor any part thereof has been paid by said co-partners or by the defendant, United States Fidelity and Guaranty Company, although demand of payment thereof has heretofore and prior to commencement of the above entitled action been made by plaintiff, upon said co-partners and said defendant."

4. The appellant will raise the point on appeal that the Contractors' Public Liability Policy issued by the United States Fidelity and Guaranty Company to Coverdale & Johnson (defendant's exhibit No. 27) was a clear and unambiguous contract of insurance which should have been construed by the court without recourse to extrinsic evidence and that by reason of the failure of the plaintiff in the court below to request or plead a reformation of said policy and notwithstanding the fact that no issue of reformation thereof was made or raised at any time in the pleadings or in the trial of said actions the court was in error:

(a) In that in Finding of Fact No. VIII in each of said causes of action the court disregarded the exclusions in the policy and in effect reformed the same as follows:

"The policy of insurance so written and delivered contains exclusion provisions which are antagonistic and contrary to the requirements of the aforesaid agreement with the State Highway Commission of the State of Montana, and such exclusion provisions were and are inoperative to defeat recovery in this action."

(b) In that it appears from the written opinion of the trial court that the provisions of the Contractors' Public Liability Policy were construed together with the contract (plaintiff's exhibit 1 on deposition), the bond (plaintiff's exhibit 2 on deposition), the letter from the Montana Highway Commission to Coverdale & Johnson (plaintiff's exhibit 3 on deposition), the letter from the United States Fidelity and Guaranty Company to the State Highway Commission of the State of Montana (plaintiff's exhibit 4 on deposition) and with the evidence of W. O. Whipps, all of which is summed up in the statement of the court on the last page of the typewritten opinion in the following language:

"Under the construction given the policy, reading it as one with the agreement and bond, together with the evidence, reformation seems unnecessary, since it would mean the same in any event."

5. By filing this statement of points the appellant in each of said causes does not intend to waive

the right to urge error upon any of the rulings or findings of the trial court resulting in a judgment in each of said causes in favor of the plaintiff and against the defendant.

Dated this 19th day of October, 1940.

HOWARD TOOLE
W. T. BOONE
Attorneys for the Appellant, United States Fidelity and Guaranty Company, a corporation, in each of the above entitled causes.

[Endorsed]: Filed Oct. 26, 1940. Paul P. O'Brien, Clerk.

No. 9668

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,
Appellant,

vs.

ETHEL M. DOHENY, as Administratrix of the Estate of Roberta Doheny, Deceased,
Appellee.

and

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,
Appellant,

vs.

ETHEL M. DOHENY, as Administratrix of the Estate of Marguerite Doheny, Deceased,
Appellee.

Supplemental Transcript of Record

Upon Appeals from the District Court of the United States for the District of Montana.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO.

No. 9668

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,
Appellant,

vs.

ETHEL M. DOHENY, as Administratrix of the Estate of Roberta Doheny, Deceased,
Appellee.

and

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,
Appellant,

vs.

ETHEL M. DOHENY, as Administratrix of the Estate of Marguerite Doheny, Deceased,
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Supplemental Transcript of Record

Upon Appeals from the District Court of the United States for the District of Montana.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Ethel M. Doheny as Administratrix of the estate of Marguerite Doheny, deceased, vs. John M. Coverdale, et al.

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PLAINTIFF'S EXHIBIT 1.

In the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade.

ETHEL M. DOHENY, as administratrix of the estate of ROBERTA DOHENY, deceased,
Plaintiff,

vs.

JOHN M. COVERDALE and E. O. JOHNSON, co-partners doing business under the firm name and style of COVERDALE & JOHNSON,
Defendants.

COMPLAINT

Comes Now the above named plaintiff and for a cause of action against the defendants herein complains and alleges:

I.

That on or about the 12th day of December, 1934, one Roberta Doheny died intestate and, thereafter, upon petition filed in the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clark by Ethel M. Doheny, the said District Court of Lewis and Clark County by an order in writing duly given, made and entered on the 8th day of April, 1935, appointed said Ethel M. Doheny Administratrix of the estate of said Roberta Doheny, deceased, and directed letters of administration on the estate of said decedent to issue to said Ethel M. Doheny

upon her taking oath and filing bond in said estate conditioned for the faithful performance of her duties as administratrix; and, thereafter, pursuant to said order letters of administration upon the estate of Roberta Doheny were duly issued by the said court under the seal of said court and the hand of the clerk thereof unto Ethel M. Doheny plaintiff herein. [1]

II.

That at all times hereinafter mentioned the defendants John M. Coverdale and E. O. Johnson were, at all time since have been, and now are co-partners doing business under the firm name and style of Coverdale & Johnson.

III.

That at all times during the month of December, 1934, the defendant E. O. Johnson, was the owner of a certain Ford Sedan automobile, Montana license number 13-1865 for the year 1934, and that said automobile was used in connection with the business of said John M. Coverdale and E. O. Johnson as co-partners.

IV.

That on the 11th day of December, 1934, and for a period of time immediately prior thereto, one George S. Bardon was in the employ of the said defendant and engaged in work directly connected with the performance by the defendants of that certain written contract theretofore entered into between said defendants and the state of Montana

through the Highway Commission of said state, which contract is hereinafter more particularly referred to.

V.

That on or about the 21st day of September A. D. 1934, the defendants made and entered into a certain written agreement with the state of Montana by and through the State Highway Commission of said state of Montana, whereby the said defendants in consideration of the payment or payments of [2] money specified in said contract promised and agreed to pay for all the materials and to furnish all tools, machinery and improvements and to do and perform all the work and labor in the construction or improvement of certain bridges in Lewis and Clark County, State of Montana, in connection with and as a part of a certain public highway in said county known as the Augusta-Sun River Road said bridges being particularly described in said written contract as "1 concrete bridge and 5 treated timber pile trestle bridges and stock passes". That thereafter on or about the 25th day of September, 1934, the said defendants commenced the construction and improvement work in accordance with the terms and provisions of aforesaid contract; and, thereafter, up to and including the 1st day of February, 1935 were engaged in the performance of the construction and improvement work specified in said contract.

VI.

That on or about the 20th day of October, 1934, the said defendants rented certain equipment from E. H. Blakeslee consisting of an Ersted two drum hoist with tractor power to be used in connection with the performance of the construction and improvement work specified in the above mentioned contract and that on or about said 20th day of October, 1934, the said defendants and E. H. Blakeslee entered into a written agreement whereby the use of said equipment was rented to the defendants at an agreed rental rate of $84.00 per month and the said defendants promised and agreed to return said equipment and unload and deliver same to the said Blakeslee in the event the rental [3] period of such equipment should exceed thirty days. That thereafter on or about October 20, 1934, the defendants took possession and used said equipment for a period of approximately fifty-two days in the performance of the construction and improvement work specified in said agreement with the State of Montana and, thereafter, to-wit, at a time known to defendants but unknown to plaintiff and between December 1, 1934, and December 11, 1934, the said defendants shipped said equipment to Great Falls, Montana, for the purpose of redelivering the same to aforesaid E. H. Blakeslee.

VII.

That on or about the 10th day of December, 1934, at approximately 10 o'clock P. M. the aforesaid E. O. Johnson and George S. Bardon left Augusta,

Montana, traveling in the above mentioned automobile owned by E. O. Johnson with Great Falls, Montana, as their destination for the purpose of unloading and delivering to E. H. Blakeslee at Great Falls, Montana, in accordance with the terms of the aforesaid written agreement, the aforesaid equipment theretofore rented by the defendants from the said Blakeslee and at the request and invitation of said E. O. Johnson and George S. Bardon to accompany them to Great Falls, Montana, while they unloaded and delivered aforesaid equipment and thereafter return to Augusta, Montana, the said Roberta Doheny and her sister Marguerite Doheny accompanied said E. O. Johnson and George S. Bardon to Great Falls, Montana, in said automobile arriving at Great Falls, Montana, at approximately 11:55 P. M. on the day of December 10, 1934. That upon their arrival at Great Falls Montana, the aforesaid equipment was unloaded and delivered by [4] said defendants to E. H. Blakeslee by and through the assistance at the time of the said E. O. Johnson and George S. Bardon. That after said equipment was unloaded and delivered to the said E. H. Blakeslee the said E. O. Johnson and George S. Bardon Roberta Doheny and Marguerite Doheny left Great Falls, Montana, in the above mentioned automobile with Augusta, Montana, as their return destination and by way of that public highway known as the Great Falls-Augusta road which is the main highway for public travel between Great Falls, Montana, and Augusta, Montana. That

at all times from and after the said persons left Great Falls, Montana, up to and including the time the automobile in which they were riding left the public highway and collided with the tree as hereinafter set forth the said George S. Bardon drove, operated and controlled the movements of said automobile under the direction of the said E. O. Johnson.

VIII.

That when said automobile with the occupants aforesaid arrived at a point within Cascade County, Montana, on said public highway where same has and takes its direction and course through the town of Simms, Montana, the said George S. Bardon, while in the employ of the defendants as aforesaid and while under the direction of E. O. Johnson, drove and controlled said automobile in such a grossly negligent and reckless manner that said automobile while traveling at a speed of approximately between fifty and sixty miles an hour was permitted by him to turn directly from and move off and from said public highway and crash into and collide with a large tree growing approximately twelve feet away from and to the side of said public [5] highway in said Cascade County, Montana. That at the time and place on said highway when and where said automobile was permitted by the said George S. Bardon to leave said highway and collide with the tree aforesaid the said highway was approximately thirty feet wide in good and safe condition for travel by automobile

and other means of conveyance and extended in an approximate straight line with a clear and unobstructed view for a distance of approximately one-half mile West and approximately one mile East from the place on said highway where the automobile driven at the time by aforesaid George S. Bardon was permitted by said George S. Bardon to leave the public highway and crash into the tree as aforesaid.

IX.

That by reason of said automobile being permitted by the said George S. Bardon and the said E. O. Johnson to move off of and away from the public highway and collide with and crash into the tree as aforesaid the said Roberta Doheny was thrown and hurled against the front seat and interior of the said automobile with great force and violence and her body was battered, bruised and cut and as a result thereof she suffered and sustained severe and serious bodily injuries and suffered great bodily pain and mental anguish and thereafter on or about the 12th day of December, 1934, as a result of the injuries sustained by her as aforesaid Roberta Doheny died all to her great damage in the sum of $50,000.00. That as a result of the injuries sustained at the time and place aforesaid Roberta Doheny was compelled to employ the services of a physician and obtain special hospital care and attention and become obligated for the payment of same [6] to her further damage in the sum of $50.00.

X.

That at the time of the grossly negligent and reckless operation of the automobile as aforesaid and the infliction of the injuries upon Roberta Doheny, causing her death, the said Roberta Doheny was of the age of eighteen years, in good health and although she had not been employed in a gainful occupation for approximately three weeks she was capable of earning approximately $60.00 per month and at the time of her death had arranged to resume employment the following month at a rate of compensation of approximately $60.00 per month.

Wherefore, plaintiff prays judgment against the defendants in the sum of $50,050.00 together with the cost and disbursements necessarily incurred in and by reason of the within action and for such other and further relief as may be proper.

HALL AND McCABE,
Attorneys for Plaintiff. [7]

State of Montana
County of Cascade—ss.

E. J. McCabe being first duly sworn upon his oath deposes and says:

That he is a member of the law firm of Hall & McCabe, attorneys for the plaintiff named in the within and foregoing complaint and that, as one of said attorneys for plaintiff, affiant makes this affidavit of verification for and on behalf of plaintiff

for the reason that said plaintiff is absent from Cascade County, Montana, wherein her attorneys reside and maintain their office and where this affidavit of verification is made;

That affiant has read the foregoing complaint, knows the contents thereof and that same is true to the best knowledge, information and belief of affiant.

E. J. McCABE.

Subscribed and sworn to before me this 7th day of June, 1935.

[Notarial Seal] ANNE L. PEPOS,
Notary Public for the State of Montana, residing at Great Falls, Montana.

My commission expires April 28, 1938.

[Endorsed]: Filed in state court June 7, 1935.

[8]

PLAINTIFF'S EXHIBIT 2.

[Title of State Court and Cause.]

SEPARATE ANSWER OF DEFENDANT JOHN M. COVERDALE.

Comes now the defendant John M. Coverdale and in answer to plaintiff's complaint on file herein admits, denies and alleges as follows:

I.

Answering paragraph I of the complaint this answering defendant admits the allegations therein contained.

II.

Answering paragraph II of the complaint this answering defendant admits that the defendants John M. Coverdale and E. O. Johnson were, on the 11th day of December 1934, and for sometime prior thereto, had been co-partners doing business under the firm, name and style of Coverdale & Johnson. This answering defendant denies each, every and all of the other allegations contained in said paragraph II.

III.

Answering paragraph III of the complaint this answering defendant admits that the defendant E. O. Johnson was on the 11th day of December 1934 the owner of a certain Ford V8 Sedan automobile and that the same bore Montana License plates Number [9] 13-1865 for the year 1934. This answering defendant denies each, every and all of the other allegations contained in said paragraph III.

IV.

Answering paragraph IV of the complaint this answering defendant admits that for a period of time prior to the 11th day of December 1934 one George S. Bardon was in the employ of the defendant partnership Coverdale & Johnson and directly connected with the performance by the defendant Coverdale & Johnson of that certain written contract theretofore entered into between said defendant and State of Montana through the Highway Commission, which contract is more particularly

referred to in said complaint; this answering defendant denies that the said George S. Bardon was in the employ of defendant Coverdale & Johnson on the said 11th day of December 1934, or any time thereafter. This answering defendant denies each, every and all of the other allegations in said paragraph IV.

V.

Answering paragraphs V and VI of the complaint this answering defendant admits the allegations therein contained.

VI.

Answering paragraph VII of the complaint this answering defendant alleges that he has not sufficient information upon which to base a belief with respect thereto and therefore denies each, every and all of the allegations therein contained.

In this connection this answering defendant alleges that if the said Roberta Doheny and her sister Marguerite Doheny did [10] accompany the said defendant E. O. Johnson and the said George S. Bardon from Augusta to Great Falls, Montana and return on the said 10th day of December 1934 in said automobile owned by the said defendant E. O. Johnson, the said defendant E. O. Johnson and the said George S. Bardon had not been instructed or directed, or granted permission or authority by the defendant John M. Coverdale or by the defendant partnership Coverdale & Johnson to invite, request, permit or allow any person and/or particularly the said Roberta Doheny and

Marguerite Doheny to ride in said Ford V8 Sedan automobile belonging to the defendant E. O. Johnson on said trip from Augusta, Montana to Great Falls, Montana and return. This answering defendant further alleges that the defendant E. O. Johnson and/or George S. Bardon did not have any right, authority, permission or allowance from the defendant John M. Coverdale or the defendant partnership, Coverdale & Johnson to permit or allow any person or persons and/or particularly said Roberta Doheny and Marguerite Doheny to ride in said Ford V8 Sedan automobile at said time and place.

This answering defendant further alleges that if the said Roberta Doheny and Marguerite Doheny did actually ride in said Ford V8 Sedan automobile belonging to the defendant E. O. Johnson at said time and place, with the said defendant E. O. Johnson and George S. Bardon, the said Marguerite Doheny and Roberta Doheny did so without the consent, permission, invitation or authority of the defendant John M. Coverdale or the defendant partnership Coverdale & Johnson, and if the said Roberta Doheny and Marguerite Doheny did actually ride with the defendant E. O. Johnson and George S. Bardon in said Ford V8 Sedan automobile [11] at said time and place, on the invitation or with the permission or consent of the defendant E. O. Johnson, the said defendant E. O. Johnson was then and there acting on his own behalf and outside the scope of his authority given unto him

by the defendant partnership Coverdale & Johnson and not in the transaction of the business of the defendant partnership Coverdale & Johnson and the said defendant E. O. Johnson was not then and there acting as a partner, servant or agent of the defendant partnership Coverdale & Johnson or acting in the course of his employment in inviting, permitting or allowing the said Roberta Doheny and Marguerite Doheny to ride with him in the said automobile at the said time and place.

In this connection this answering defendant further alleges that if the said Roberta Doheny and Marguerite Doheny did actually ride in said Ford V8 Sedan automobile at the said time and place, with the defendant E. O. Johnson and said George S. Bardon on the invitation or with the permission or consent of George S. Bardon, the said George S. Bardon was then and there acting in his own behalf and outside the scope of any authority, consent or permission given unto him by this answering defendant or by the defendant partnership Coverdale & Johnson and that the said George S. Bardon was not then and there acting as a servant or agent of the defendant John M. Coverdale or the defendant partnership Coverdale & Johnson, or acting in the course of his employment in inviting, permitting or allowing the said Roberta Doheny and Marguerite Doheny to ride with him in said Ford V8 Sedan automobile.

This answering defendant further alleges that by reason of the aforesaid the said Roberta Doheny

and Marguerite Doheny in [12] so riding in said Ford V-8 Sedan automobile were not invitees or guests of the defendant John M. Coverdale or the defendant partnership Coverdale & Johnson and further alleges that the death of the said Roberta Doheny, if resulting from injuries received while riding in said Ford V8 Sedan automobile was not the result of any negligence or the result of any of the acts or omissions of this answering defendant or of the defendant Coverdale & Johnson.

VII.

Answering paragraph VIII of the complaint this answering defendant alleges that he has not sufficient information upon which to base a belief with respect thereto and therefore denies each, every and all of the allegations therein contained.

VIII.

Answering paragraph IX of the complaint this answering defendant admits that Roberta Doheny died on or about the 12th day of December 1934. Further answering paragraph IX this answering defendant alleges that he has not sufficient information upon which to base a belief with respect thereto and therefore denies each, every and all of the other allegations therein contained.

IX.

Further answering said complaint this answering defendant denies each, every and all of the allega-

tions therein contained and not hereinbefore specifically admitted, qualified or denied.

Wherefore, having fully answered this answering defendant prays that the plaintiff take nothing by her complaint and that [13] he recover his costs herein expended.

HOWARD TOOLE
W. T. BOONE
Attorneys for defendant,
John M. Coverdale.

State of Montana
County of Missoula—ss.

W. T. Boone, being first duly sworn upon his oath, deposes and says: That he is one of the attorneys for the defendant, John M. Coverdale, in the above entitled action; that he makes this verification on behalf of said defendant John M. Coverdale, for the reason that said defendant is not now within Missoula County, Montana, where affiant resides. That he has read the foregoing answer and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

W. T. BOONE.

Subscribed and sworn to before me this 23rd day of November, 1935.

[Seal] JOHN E. PATTERSON,
Notary Public for the State of Montana; residing at Missoula, Montana.

State of Montana
County of Missoula—ss:

Valborg Moe, being first duly sworn upon her oath deposes and says: that she is over the age of twenty-one years and is not interested in the above entitled action; that Hall & McCabe appear as attorneys of record for the plaintiff in said action, and have and maintain their office in the Strain Building at Great Falls, Montana; that Howard Toole and W. T. Boone appear as attorneys of record for the defendant John M. Coverdale in said action, and have and maintain their office in the Montana Building at Missoula, Montana. That there is a daily communication by mail between Missoula, Montana, and Great Falls, Montana; that on the 25th day of November, 1935, this affiant served a copy of the foregoing separate answer of defendant John M. Coverdale upon the attorneys for the plaintiff by depositing in the United States postoffice at Missoula, Montana, in a sealed envelope with postage paid, addressed to Hall & McCabe, Attorneys at Law, Strain Building, Great Falls, Montana, a true copy of said separate answer of John M. Coverdale.

VALBORG MOE.

Subscribed and sworn to before me this 25th day of November, 1935.

[Seal] W. T. BOONE,
Notary Public for the State of Montana; residing at Missoula, Montana.

My commission expires August 2, 1938. [15]

[Endorsed]: Filed in state Court Nov. 27, 1935. [14]

PLAINTIFF'S EXHIBIT 3.

[Title of State Court and Cause.]

SEPARATE ANSWER OF DEFENDANT COVERDALE & JOHNSON, A CO-PARTNERSHIP.

Comes now the defendant Coverdale & Johnson, a co-partnership, and in answer to plaintiff's complaint on file herein admits, denies and alleges as follows:

I.

Answering paragraph I of the complaint this answering defendant admits the allegations therein contained.

II.

Answering paragraph II of the complaint this answering defendant admits that the defendants John M. Coverdale and E. O. Johnson were on the 11th day of December 1934, and for sometime prior thereto, had been co-partners doing business under the firm, name and style of Coverdale & Johnson. This answering defendant denies each, every and all of the other allegations contained in said paragraph II.

III.

Answering paragraph III of the complaint this answering defendant admits that the defendant E. O. Johnson was on the 11th day of December 1934 the owner of a certain Ford V8 Sedan auto-[16] mobile and that the same bore Montana License plates Number 13-1865 for the year 1934.

This answering defendant denies each, every and all of the other allegations contained in said paragraph III.

IV.

Answering paragraph IV of the complaint this answering defendant admits that for a period of time prior to the 11th day of December 1934 one George S. Bardon was in the employ of the defendant partnership Coverdale & Johnson and directly connected with the performance by the defendant Coverdale & Johnson of that certain written contract theretofore entered into between said defendant and State of Montana through the Highway Commission, which contract is more particularly referred to in said complaint; this answering defendant denies that the said George S. Bardon was in the employ of defendant Coverdale & Johnson on the said 11th day of December 1934, or any time thereafter. This answering defendant denies each, every and all of the other allegations in said paragraph IV.

V.

Answering paragraphs V and VI of the complaint this answering defendant admits the allegations therein contained.

VI.

Answering paragraph VII of the complaint this answering defendant alleges that it has not sufficient information upon which to base a belief with respect thereto and therefore denies each, every and all of the allegations therein contained.

In this connection this answering defendant alleges that if the said Roberta Doheny and her sister Marguerite Doheny did [17] accompany the said defendant E. O. Johnson and the said George S. Bardon from Augusta to Great Falls, Montana and return on the said 10th day of December 1934 in said automobile owned by the said defendant E. O. Johnson, the said defendant E. O. Johnson and the said George S. Bardon had not been instructed or directed, or granted permission or authority by the defendant Coverdale & Johnson to invite, request, permit or allow any person and/or particularly the said Roberta Doheny and Marguerite Doheny to ride in said Ford V8 Sedan automobile belonging to the defendant E. O. Johnson on said trip from Augusta, Montana to Great Falls, Montana, and return. This answering defendant further alleges that the defendant E. O. Johnson and/or George S. Bardon did not have any right, authority, permission or allowance from the defendant, Coverdale & Johnson to permit or allow any person or persons and/or particularly said Roberta Doheny and Marquerite Doheny to ride in said Ford V8 Sedan automobile at said time and place.

This answering defendant further alleges that if the said Roberta Doheny and Marguerite Doheny did actually ride in said Ford V8 Sedan automobile belonging to the defendant E. O. Johnson at said time and place, with the said defendant E. O. Johnson and George S. Bardon, the said Roberta Doheny and Marguerite Doheny did so without the

consent, permission, invitation or authority of the defendant Coverdale & Johnson, and if the said Roberta Doheny and Marguerite Doheny did actually ride with the defendant E. O. Johnson and George S. Bardon in said Ford V8 Sedan automobile at said time and place, on the invitation or with the permission or consent of the defendant E. O. Johnson, the [18] said defendant E. O. Johnson was then and there acting on his own behalf and outside the scope of his authority given unto him by the defendant partnership Coverdale & Johnson and not in the transaction of the business of the defendant partnership Coverdale & Johnson and the said defendant E. O. Johnson was not then and there acting as a partner, servant or agent of the defendant Coverdale & Johnson or acting in the course of his employment in inviting, permitting or allowing the said Roberta Doheny and Marguerite Doheny to ride with him in the said automobile at said time and place.

In this connection this answering defendant further alleges that if the said Roberta Doheny and Marguerite Doheny did actually ride in said Ford V8 Sedan at said time and place, with the defendant E. O. Johnson and George S. Bardon, on the invitation or with the permission or consent of George S. Bardon the said George S. Bardon was then and there acting in his own behalf and outside of the scope of any authority, consent or permission given unto him by this answering defendant, Coverdale & Johnson and the said George S.

Bardon was not then and there acting as a servant or agent of the defendant Coverdale & Johnson, or acting in the course of his employment in inviting, permitting or allowing the said Roberta Doheny and Marguerite Doheny to ride with him in said Ford V8 Sedan automobile.

This answering defendant further alleges that by reason of the aforesaid the said Roberta Doheny and Marguerite Doheny in so riding in said Ford V-8 Sedan were not invitees or guests of the defendant Coverdale & Johnson, and further alleges that [19] the death of the said Roberta Doheny, if resulting from injuries received while riding in said Ford V8 Sedan automobile was not the result of any negligence or the result of any of the acts or omissions of this answering defendant Coverdale & Johnson.

VII.

Answering paragraph VIII of the complaint this answering defendant alleges that it has not sufficient information upon which to base a belief with respect thereto and therefore denies each, every and all of the allegations therein contained.

VIII.

Answering paragraph IX of the complaint this answering defendant admits that Roberta Doheny died on or about the 12th day of December 1934. Further answering paragraph IX this answering defendant alleges that it has not sufficient information upon which to base a belief with respect

thereto and therefore denies each, every and all of the other allegations therein contained.

IX.

Further answering said complaint this answering defendant denies each, every and all of the allegations therein contained and not hereinbefore specifically admitted, qualified or denied.

Wherefore, having fully answered this answering defendant prays that the plaintiff take nothing by her complaint and that it recover its costs herein expended.

HOWARD TOOLE
W. T. BOONE
Attorneys for defendant,
Coverdale & Johnson. [20]

State of Montana
County of Missoula—ss.

W. T. Boone, being first duly sworn upon his oath, deposes and says: That he is one of the attorneys for the defendant Coverdale & Johnson in the above entitled action; that he makes this verification on behalf of said defendant, Coverdale & Johnson, a co-partnership, for the reason that none of the officers or agents of said co-partnership are within Missoula County, Montana, where affiant resides. That he has read the foregoing answer and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

W. T. BOONE.

Subscribed and sworn to before me this 23rd day of November, 1935.

[Seal] JOHN E. PATTERSON,
Notary Public for the State of Montana; residing at Missoula, Montana.

My commission expires April 22, 1937.

State of Montana
County of Missoula—ss:

Valborg Moe, being first duly sworn upon her oath deposes and says: that she is over the age of twenty-one years and is not interested in the above entitled action; that Hall & McCabe appear as attorneys of record for the plaintiff in said action, and have and maintain their offices in the Strain Building at Great Falls, Montana; that Howard Toole and W. T. Boone appear as attorneys of record for the defendant Coverdale & Johnson in said action, and have and maintain their office in the Montana Building at Missoula, Montana. That there is a daily communication by mail between Missoula, Montana, and Great Falls, Montana; that on the 25th day of November, 1935, this affiant served a copy of the foregoing separate answer of defendant Coverdale & Johnson upon the attorneys for the plaintiff by depositing in the United States Postoffice at Missoula, Montana, in a sealed envelope with postage paid, addressed to Hall & McCabe, Attorneys at Law, Strain Building, Great Falls, Montana, a true copy of said separate answer of Coverdale & Johnson.

VALBORG MOE.

Subscribed and sworn to before me this 25th day of November, 1935.

[Seal] W. T. BOONE,

Notary Public for the State of Montana; residing at Missoula, Montana.

My commission expires August 2, 1938. [22]

[Endorsed]: Filed in state Court Nov. 27, 1935. [21]

PLAINTIFF'S EXHIBIT 4

[Title of State Court and Cause.]

REPLY TO SEPARATE ANSWER OF DEFENDANTS COVERDALE & JOHNSON, A CO-PARTNERSHIP.

For reply to the separate answer of defendant, Coverdale & Johnson, herein the plaintiff admits, denies and alleges as follows:

I.

Denies that the said defendant E. O. Johnson and George S. Bardon had not been instructed or directed or granted permission or authority by the defendant Coverdale & Johnson to invite, request, permit or allow any person and particularly the said Roberta Doheny and Marguerite Doheny to ride in said Ford V8 Sedan automobile belonging to the defendant E. O. Johnson on said trip from Augusta to Great Falls, Montana, and return; and,

denies that the defendant E. O. Johnson and George S. Bardon did not have any right, authority, permission or allowance from the defendant Coverdale & Johnson to permit or allow any person or persons and particularly said Roberta Doheny and Marguerite Doheny to ride in said Ford V8 Sedan automobile at the time and place referred to in paragraph VI of said answer.

Further replying to paragraph VI of said answer plaintiff denies that at the time of riding in said Ford V8 Sedan automo- [23] bile belonging to defendant E. O. Johnson with the said defendant E. O. Johnson and George S. Bardon the said Roberta Doheny and Marguerite Doheny did so without the consent, permission, invitation or authority of defendant Coverdale & Johnson; and, denies that at the time and place said Roberta Doheny and Marguerite Doheny rode in the said Ford V8 Sedan automobile on the invitation and with the permission and consent of the defendant E. O. Johnson that the said defendant E. O. Johnson was then and there acting on his own behalf and outside the scope of his authority given unto him by the defendant partnership Coverdale & Johnson; and, denies that such invitation, permission and consent was not in the transaction of the business of the defendant partnership Coverdale & Johnson; and, denies that the said defendant E. O. Johnson was not at the time then and there acting as a partner, servant or agent of the defendant partnership Coverdale & Johnson; and, denies that he was not then and there

acting in the scope of his employment in inviting, permitting and allowing the said Roberta Doheny and Marguerite Doheny to ride with him in the said automobile at the time and place mentioned.

Further replying to said paragraph VI of defendant's answer plaintiff denies that at the time the said Roberta Doheny and Marguerite Doheny were riding in said Ford V8 Sedan at the time and place mentioned with the defendant E. O. Johnson and George S. Bardon on the invitation and with the permission and consent of said George S. Bardon that the said George S. Bardon was then and there acting in his own behalf and outside the scope of any authority, consent and permission given unto [24] him by said defendant Coverdale & Johnson; and, denies that the said George S. Bardon was not then and there acting as a servant and agent of the defendant Coverdale & Johnson; and, denies that the said George S. Bardon was not then and there acting in the course of his employment in inviting, permitting and allowing the said Roberta Doheny and Marguerite Doheny to ride with him in said Ford V8 Sedan automobile.

Further replying to said paragraph VI of defendant's answer plaintiff denies that at the time and place the said Roberta Doheny and Marguerite Doheny were riding in said Ford V8 Sedan automobile they were not invitees or guests of the defendant Coverdale & Johnson; and, denies that the death of said Roberta Doheny resulting in injuries received while riding in said Ford V8 Sedan automobile was not the result of any negligence or the

result of any of the acts or omissions of said answering defendant Coverdale & Johnson.

Wherefore, having fully replied to the answer of said defendant Coverdale & Johnson plaintiff prays judgment in accordance with her complaint herein.

HALL & McCABE
Attorneys for Plaintiff. [25]

State of Montana,
County of Cascade—ss.

E. J. McCabe being first duly sworn upon his oath deposes and says:

That he is one of the members of the co-partnership of Hall & McCabe, attorneys for the plaintiff named in the within and foregoing reply and that as one of the attorneys for said plaintiff he makes this verification on behalf of said plaintiff for the reason that plaintiff is not within Cascade County Montana where her attorneys reside and where this verification is made.

That affiant has read the foregoing reply, knows the contents thereof, and that same is true to the best knowledge, information and belief of affiant.

E. J. McCABE

Subscribed and sworn to before me this 4th day of March, 1936.

[Seal] EDW. C. ALEXANDER
Notary Public for the State of Montana, Residing at Great Falls, Montana.

My commission expires Sept. 11, 1938.

[Endorsed]: Filed in State Court March 5, 1936.

PLAINTIFF'S EXHIBIT 5

[Title of State Court and Cause.]

REPLY TO SEPARATE ANSWER OF DEFENDANT JOHN M. COVERDALE

For reply to the separate answer of defendant, John M. Coverdale, herein the plaintiff admits, denies and alleges as follows:

I.

Denies that the said defendant E. O. Johnson and George S. Bardon had not been instructed or directed or granted permission or authority by the defendant Coverdale & Johnson to invite, request, permit or allow any person and particularly the said Roberta Doheny and Marguerite Doheny to ride in said Ford V8 Sedan automobile belonging to the defendant E .O. Johnson on said trip from Augusta to Great Falls, Montana, and return; and, denies that the defendant E. O. Johnson and George S. Bardon did not have any right, authority, permission or allowance from the defendant Coverdale & Johnson and defendant John M. Coverdale to permit or allow any person or persons and particularly said Roberta Doheny and Marguerite Doheny to ride in said Ford V8 Sedan automobile at the time and place referred to in paragraph [27] VI of said answer.

Further replying to paragraph VI of said answer plaintiff denies that at the time of riding in said Ford V8 Sedan automobile belonging to defendant E. O. Johnson with the said defendant E. O. John-

son and George S. Bardon the said Marguerite Doheny and Roberta Doheny did so without the consent, permission, invitation or authority of defendant Coverdale & Johnson and defendant John M. Coverdale; and, denies that at the time and place said Roberta Doheny and Marguerite Doheny rode in the said Ford V8 Sedan automobile on the invitation and with the permission and consent of the defendant E. O. Johnson that the said defendant E. O. Johnson was then and there acting on his own behalf and outside the scope of his authority given unto him by the defendant partnership Coverdale & Johnson and defendant John M. Coverdale; and, denies that such invitation, permission and consent was not in the transaction of the business of the defendant partnership Coverdale & Johnson and defendant John M. Coverdale; and, denies that the said defendant E. O. Johnson was not at the time then and there acting as a partner, servant or agent of the defendant partnership Coverdale & Johnson; and, denies that he was not then and there acting in the scope of his employment in inviting, permitting and allowing the said Roberta Doheny and Marguerite Doheny to ride with him in the said automobile at the time and place mentioned.

Further replying to said paragraph VI of defendant's answer plaintiff denies that at the time the said Roberta Doheny and Marguerite Doheny were riding in said Ford V8 Sedan at the time and place mentioned with the defendant E. O. Johnson and George [28] S. Bardon on the invitation and with the permission and consent of said George

S. Bardon that the said George S. Bardon was then and there acting in his own behalf and outside the scope of any authority, consent and permission given unto him by said defendant Coverdale & Johnson and defendant John M. Coverdale; and, denies that the said George S. Bardon was not then and there acting as a servant and agent of the defendant Coverdale & Johnson and defendant John M. Coverdale; and, denies that the said George S. Bardon was not then and there acting in the course of his employment in inviting, permitting and allowing the said Roberta Doheny and Marguerite Doheny to ride with him in said Ford V8 Sedan automobile.

Further replying to said paragraph VI of defendant's answer plaintiff denies that at the time and place the said Roberta Doheny and Marguerite Doheny were riding in said Ford V8 Sedan automobile they were not invitees or guests of the defendant Coverdale & Johnson and defendant John M. Coverdale; and, denies that the death of said Roberta Doheny resulting in injuries received while riding in said Ford V8 Sedan automobile was not the result of any negligence or the result of any of the acts or omissions of said answering defendant Coverdale & Johnson and defendant John M. Coverdale.

Wherefore, having fully replied to the answer of said defendant John M. Coverdale plaintiff prays judgment in accordance with her complaint herein.

HALL & McCABE

Attorneys for Plaintiff. [29]

State of Montana,
County of Cascade—ss.

E. J. McCabe being first duly sworn upon his oath deposes and says:

That he is one of the members of the co-partnership of Hall & McCabe attorneys for the plaintiff named in the within and foregoing reply and that as one of the attorneys for said plaintiff he makes this verification on behalf of said plaintiff for the reason that plaintiff is not within Cascade County, Montana, where her attorneys reside and where this verification is made.

That affiant has read the foregoing reply, knows the contents thereof, and that same is true to the best knowledge, information and belief of affiant.

E. J. McCABE

Subscribed and sworn to before me this 4th day of March, 1936.

[Seal] EDW. C. ALEXANDER
Notary Public for the State of Montana. Residing at Great Falls, Montana.

My commission expires Sept. 11, 1938.

[Endorsed]: Filed March 5, 1936 in State Court.

[30]

PLAINTIFF'S EXHIBIT 6

[Title of State Court and Cause.]

AFFIDAVIT OF SERVICE

State of Montana,
County of Cascade—ss.

Marie V. Dionne being first duly sworn upon her oath deposes and says:

That she is over the age of twenty-one years and is not interested in the above entitled action;

That Hall & McCabe appear as attorneys of record for the plaintiff in said action and have and maintain their office at Great Falls, Montana; and, that Messrs. Howard Toole and W. T. Boone appear as attorneys of record for the defendants Coverdale & Johnson, a co-partnership, and John M. Coverdale personally in said action and have and maintain their office in the Montana Building at Missoula, Montana;

That there is a regular and daily communication by United States mail between Great Falls, Montana, and Missoula, Montana;

That on the 5th day of March, 1936, this affiant at the request of the above named attorneys for the plaintiff served copies of the replies of plaintiff to the separate answers of defendants Coverdale & Johnson and defendant John M. Coverdale upon the

[31]

attorneys for said defendants by depositing in the United States post office at Great Falls, Montana, true and correct copies of said replies and each thereof in a sealed envelope with postage prepaid

thereon addressed to Messrs. Howard Toole and W. T. Boone, Attorneys at Law, Montana Building, Missoula, Montana for transmission and delivery to said attorneys for said defendants in regular course of mail.

MARIE V. DIONNE

Subscribed and sworn to before me this 5th day of March, 1936.

[Seal] E. McCABE
Notary Public for the State of Montana. Residing at Great Falls, Montana.

My commission expires July 15, 1936.

[Endorsed]: Filed March 5, 1936, in State Court. George Harper, Court Clerk; Thomas T. Davies, Deputy. [32]

PLAINTIFF'S EXHIBIT 7

[Title of State Court and Cause.]

ORDER TAXING COSTS AND DISBURSEMENTS

The motion filed herein by the defendants John M. Coverdale and Coverdale & Johnson, a co-partnership, to have the court tax the costs and disbursements in the above entitled action and to correct and modify the memorandum of costs and disbursements filed herein by the plaintiff, having duly and regularly come on for hearing, and the court being fully advised in the premises,

It Is Ordered, that the memorandum of costs and disbursements in the above entitled action are taxed, determined and allowed by the court as follows:

Clerk's Fees:		
Filing complaint		$ 5.00
Entry of judgment		2.50
Sheriff's fees:		
Serving summons		1.51
Witnesses' Fees:		
Mrs. Mosier, 140 miles @ 7¢ $9.80, 2 days $6	$15.80	
Mrs. J. S. Bahler, 140 miles @ 7¢ $9.80, 2 days $6	15.80	
Clare Garrity, one day	3.00	
E. Bernhardt, one day	3.00	
		[33]
Fred Chamberlain, 108 mi. @ 7¢ $7.56 2 days $6	13.56	
Mrs. L. L. Randal, 108 mi. @ 7¢ $7.56 2 days $6	13.56	
H. W. Doheny, 108 mi. @ 7¢ $7.56 2 days $6	13.56	
Eva May Allard, 2 days	6.00	
Dr. L. L. Howard, 2 days	6.00	
Robert Dawson, 64 miles @ 7¢ $4.48, 2 days $6	10.48	
Joe Ugrin, 138 miles @ 7¢ $9.66, 2 days $6	15.66	
Herschel James, 64 miles @ 7¢ $4.48, 2 days $6	10.48	
Rudolph Malmgren, 64 miles @ 7¢ $4.48, 2 days $6	10.48	
Frank Holland, 64 miles @ 7¢, $4.48, 2 days $6	10.48	
Wm. Bertsche, 2 days	6.00	
Nellie Fuller, 2 days	6.00	
H. I. Sherman, 2 days	6.00	
Jack Thompson, 2 days	6.00	
J. Woodward, 2 days	6.00	
Total witness fees and mileage	$177.86	
½ of witness fees and mileage		88.93

Miscellaneous costs:		
Jack Thompson, photographs	15.00	
Jack Raftery, Notary Public fees taking depositions of Clare Garrity and E. Bernhardt	22.90	
Total miscellaneous costs	37.90	
½ thereof		18.95
Total Costs and Disbursements		$116.89

Dated this 15 day of May, 1936.

W. H. MEIGS

Judge.

[Endorsed]: Filed May 15, 1936, in State Court.

[34]

PLAINTIFF'S EXHIBIT 8

[Title of State Court and Cause.]

VERDICT

We, the jury in the above entitled action, find in favor of the plaintiff, Ethel M. Doheny, as administratrix of the Estate of Roberta Doheny, deceased, and against the defendants, John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, in the sum of $5,000.00.

Dated this 2nd day of May, 1936.

CLARENCE W. WILSON,

Foreman.

[Endorsed]: Filed May 2, 1936 in State Court.

[35]

PLAINTIFF'S EXHIBIT 10

[Title of State Court and Cause.]

NOTICE OF APPEAL

To: Ethel M. Doheny, Administratrix of the Estate of Roberta Doheny, deceased, the plaintiff in the above entitled action, and to Messrs. Hall and McCabe, the plaintiff's attorneys and to each of you:

You and Each of You are hereby notified that John M. Coverdale, and Coverdale and Johnson, a co-partnership, defendants in the above entitled action, hereby appeal to the Supreme Court of the State of Montana, from that certain judgment made, given, returned, entered and filed in the above entitled action, in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, on the 4th day of May, 1936, as modified by that certain Order Taxing Costs and Disbursements, made, entered and filed in the above entitled action on the 15th day of May, 1936, which said judgment, as modified by said order is in favor of the plaintiff, Ethel M. [36] Doheny, administratrix of the estate of Roberta Doheny, deceased, and against the said defendants, John M. Coverdale and Coverdale and Johnson, co-partners, and is in the sum of five thousand ($5,000.00) dollars, principal, and interest from the date of said judgment until paid, at the rate of six (6) per cent, together with plaintiff's costs, taxed in the sum of one hundred sixteen and 89/100 ($116.89) dollars.

This appeal is from said judgment and from the whole thereof.

Dated this the 31st day of August, 1936.

HOWARD TOOLE
W. T. BOONE
Attorneys for John M. Coverdale and Coverdale and Johnson.

State of Montana,
County of Missoula—ss.

Valborg Moe, being first duly sworn upon her oath deposes and says: that she is over the age of twenty-one years and is not interested in the above entitled action; that Hall & McCabe appear as attorneys of record for the plaintiff in said action, and have and maintain their office in the Strain Building at Great Falls, Montana; that Howard Toole and W. T. Boone appear as attorneys of record for the defendant Coverdale & Johnson and defendant John M. Coverdale in said action, and have and maintain their office in the Montana Building at Missoula, Montana. That there is a daily communication by mail between Missoula, Montana, and Great Falls, Montana; that on the 31st day of August, 1936, this affiant served a copy of the foregoing Notice of Appeal, upon the attorneys for the plaintiff by depositing in the United States postoffice at Missoula, Montana, in a sealed envelope with postage paid, addressed to Hall & Mc-

Cabe, Attorneys at law, Strain Building, Great Falls, Montana, a true copy of said Notice of Appeal.

VALBORG MOE.

Subscribed and sworn to before me this 31st day of August, 1936.

[Seal] W. T. BOONE
Notary Public for the State of Montana; residing at Missoula, Montana.

My commission expired August 2nd, 1938. [38]

[Endorsed]: Filed Sept. 2, 1936, in State Court. [37]

PLAINTIFF'S EXHIBIT 11

In the Supreme Court of the State of Montana

(Affirmed)

March Term A. D. 192..... 1937

7630.

The Chief Justice of the Supreme Court of the State of Montana:

To the Honorable Judge of the District Court of the Eighth Judicial District, in and for the County of Cascade, Greeting.

Whereas, in the said district court in a cause between Ethel M. Doheny, Administratrix of the Estate of Roberta Doheny, deceased, Plaintiff and Respondent, and John M. Coverdale and E. O. Johnson, Defendants and Appellants wherein the

judgment of the said district court, entered in said cause on the 4th day of May A. D. 192.....1936 as modified, May 15, 1936, was in favor of the said plaintiff and respondent and against the said defendants and appellants as by the inspection of the transcript of record of said court in said cause which was brought into the Supreme Court of said state by virtue of an appeal, agreeably to the statute of said state and the rules of said Supreme Court in such case made and provided, fully and at large appears.

And Whereas, in the March term of This Court in the year of our Lord, one thousand nine hundred and Thirty-seven said cause came on to be heard before said Supreme Court and was argued by counsel.

Whereupon, on consideration, it is now here adjudged by this Court [39] that the judgment of the said Court below, entered in this cause on the 4th day of May A. D. 192..... 1936 as modified, May 15, 1936; Judgment affirmed.

Costs in this Court:
Appellant Appearance $.....
Respondent Appearance $.....
Remittitur $1.80

Said judgment to be carried into execution according to the terms thereof.

May 20, A. D. 192....., 1937.

You, Therefore, are hereby commanded that such execution and further proceedings be had in said

cause as, according to right and justice, and the laws of the State of Montana ought to be had, said appeal notwithstanding.

Witness: The Honorable W. B. Sands, Chief Justice of the Supreme Court of the State of Montana, this 4th day of June, A. D. 192..... 1937.

[Seal of the Supreme Court of the State of Montana.]

A. T. PORTER
Clerk of the Supreme Court of the State of Montana.

[Endorsed]: Filed June 5, 1937 in State Court.

[40]

PLAINTIFF'S EXHIBIT 12

[Title of State Court and Cause.]

NOTICE OF FILING REMITTITUR

To the above named Defendants and to Messrs. Howard Toole and W. T. Boone, their Attorneys:

You, and Each of You, will please take notice that on June 5, 1937 Remittitur from the Supreme Court of the State of Montana affirming the judgment in the above entitled court and cause was filed in the above entitled Court.

Dated this 5th day of June, 1937.

E. J. McCABE
H. C. HALL
Attorneys for Plaintiff.

[Endorsed]: Filed June 17, 1937 in State Court.

[41]

PLAINTIFF'S EXHIBIT 13

[Title of State Court and Cause.]

EXECUTION WRIT

The State of Montana,

To the Sheriff of County of Deer Lodge, Greeting:

Whereas, on the 4th day of May, A. D. 1936 Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, deceased, recovered a Judgment in the said District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, against John M. Coverdale and E. O. Johnson co-partners doing business under the name and style of Coverdale & Johnson, for the sum of Five thousand and no/100 ($5,000.00) Dollars damages, with interest from May 4, 1936, at the rate of six per cent per annum until paid; together with her costs and disbursements at the date of said judgment, and accruing costs amounting to the sum of One Hundred Sixteen and 89/100 ($116.89) Dollars as appears to us of Record.

And Whereas, the Judgment Roll, in the action in which said Judgment was entered, is filed in the Clerk's office of said Court, in the County of Cascade, and the said Judgment was docketed in said Clerk's office, in the said County, on the day and year first above written. And the sum of $5,116.89 with interest from May 4, 1936, at the rate of six per cent per annum is now (at the date of this writ) actually due on said Judgment.

Now, You the said Sheriff, are hereby required to make the said sum due on the said Judgment for damages, with interest as aforesaid, and costs and accruing costs, to satisfy the said Judgment, out of the personal property of the said debtors, or if sufficient personal property of said debtors cannot be found, then out of the real property in your county belonging to said debtors, on the day whereon said Judgment was docketed in the said County, or at any time thereafter, and make return of this Writ within sixty days after your receipt hereof, with what you have done endorsed thereon.

Witness: The Hon. C. F. Holt, Judge of the said Eighth Judicial District of the State of Montana, at the Court House in the County of Cascade, this 17th day of August A. D. 1937.

Attest: my hand and the seal of said Court, the day and year last above written.

[Seal] GEORGE HARPER
Clerk
By H. J. SKINNER
Deputy Clerk

Sheriff's Office

County of Deer Lodge, Montana,

I hereby certify that I received the within Execution on August 18th, 1937, and after checking in the County Assessor's Office and inquiring about town I cannot find any property belonging to John M. Coverdale personally or belonging to the co-

partnership of John M. Coverdale and E. O. Johnson.

Dated this 21st day of August, 1937.

BARNEY L. LARSEN,
Sheriff,
By JOE SCHULTZ,
Under Sheriff. [42]

Filed Sept. 8, 1937 in State Court.

PLAINTIFF'S EXHIBIT 14

In the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade

ETHEL M. DOHENY, as administratrix of the Estate of MARGUERITE DOHENY, deceased,
Plaintiff,

vs.

JOHN M. COVERDALE and E. O. JOHNSON co-partners doing business under the firm name and style of COVERDALE & JOHNSON,
Defendants.

COMPLAINT

Comes Now the above named plaintiff and for a cause of action against the defendants herein complains and alleges:

I.

That on or about the 12th day of December, 1934, one Marguerite Doheny died intestate and, thereafter, upon petition filed in the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clark by Ethel M. Doheny, the said District Court of Lewis and Clark County by an order in writing duly given, made and entered on the 8th day of April, 1935, appointed said Ethel M. Doheny Administratrix of the estate of said Marguerite Doheny, deceased, and directed letters of administration on the estate of said decedent to issue to said Ethel M. Doheny upon her taking oath and filing bond in said estate conditioned for the faithful performance of her duties as administratrix; and, thereafter, pursuant to said order letters of administration upon the estate of Marguerite Doheny were duly issued by the said court under the [43] seal of said court and the hand of the clerk thereof unto Ethel M. Doheny plaintiff herein.

II.

That at all times hereinafter mentioned the defendants John M. Coverdale and E. O. Johnson were, at all times since have been, and now are copartners doing business under the firm name and style of Coverdale & Johnson.

III.

That at all times during the month of December, 1934, the defendant E. O. Johnson, was the owner of a certain Ford Sedan automobile, Montana license number 13-1865 for the year 1934, and that said automobile was used in connection with the business of said John M. Coverdale and E. O. Johnson as co-partners.

IV.

That on the 11th day of December, 1934, and for a period of time immediately prior thereto, one George S. Bardon was in the employ of the said defendant and engaged in work directly connected with the performance by the defendants of that certain written contract theretofore entered into between said defendants and the state of Montana through the Highway Commission of said state, which contract is hereinafter more particularly referred to.

V.

That on or about the 21st day of September A. D. 1934, the defendants made and entered into a certain written agreement with the state of Montana by and through the State Highway Commission of said state of Montana, whereby the said defendants [44] in consideration of the payment or payments of money specified in said contract promised and agreed to pay for all the materials and to furnish all tools, machinery and improvements and to do and perform all the work and labor in

the construction or improvement of certain bridges in Lewis and Clark County, State of Montana, in connection with and as a part of a certain public highway in said county known as the Augusta-Sun River Road said bridges being particularly described in said written contract as "1 concrete bridge and 5 treated timber pile trestle bridges and stock passes". That thereafter on or about the 25th day of September, 1934, the said defendants commenced the construction and improvement work in accordance with the terms and provisions of aforesaid contract; and, thereafter, up to and including the 1st day of February, 1935, were engaged in the performance of the construction and improvement work specified in said contract.

VI.

That on or about the 20th day of October, 1934, the said defendants rented certain equipment from E. H. Blakeslee consisting of an Ersted two drum hoist with tractor power to be used in connection with the performance of the construction and improvement work specified in the above mentioned contract and that on or about said 20th day of October, 1934, the said defendants and E. H. Blakeslee entered into a written agreement whereby the use of said equipment was rented to the defendants at an agreed rental rate of $84.00 per month and the said defendants promised and agreed to return said equipment and unload and [45] deliver same to the said Blakeslee in the event the rental period of

such equipment should exceed thirty days. That thereafter on or about October 20th, 1934, the defendants took possession and used said equipment for a period of approximately fifty-two days in the performance of the construction and improvement work specified in said agreement with the State of Montana and, thereafter, to-wit, at a time known to defendants but unknown to plaintiff and between December 1, 1934, and December 11, 1934, the said defendants shipped said equipment to Great Falls, Montana, for the purpose of redelivering the same to aforesaid E. H. Blakeslee.

VII.

That on or about the 10th day of December, 1934, at approximately 10 o'clock P. M. the aforesaid E. O. Johnson and George S. Bardon left Augusta, Montana, traveling in the above mentioned automobile owned by E. O. Johnson with Great Falls, Montana, as their destination for the purpose of unloading and delivering to E. H. Blakeslee at Great Falls, Montana, in accordance with the terms of the aforesaid written agreement, the aforesaid equipment theretofore rented by the defendants from the said Blakeslee and at the request and invitation of said E. O. Johnson and George S. Bardon to accompany them to Great Falls, Montana, while they unloaded and delivered aforesaid equipment and thereafter return to Augusta, Montana, the said Marguerite and her sister Roberta Doheny accompanied said E. O. Johnson and George S. Bardon

to Great Falls, Montana, in said automobile, arriving at Great Falls, [46] Montana, at approximately 11:55 P. M. on the day of December 10, 1934. That upon their arrival at Great Falls, Montana, the aforesaid equipment was unloaded and delivered by said defendants to E. H. Blakeslee by and through the assistance at the time of the said E. O. Johnson and George S. Bardon. That after said equipment was unloaded and delivered to the said E. H. Blakeslee the said E. O. Johnson and George S. Bardon, Roberta Doheny and Marguerite Doheny left Great Falls, Montana, in the above mentioned automobile with Augusta, Montana, as their return destination and by way of that public highway known as the Great Falls-Augusta road which is the main highway for public travel between Great Falls, Montana, and Augusta, Montana. That at all times from and after the said persons left Great Falls, Montana, up to and including the time the automobile in which they were riding left the public highway and collided with the tree as hereinafter set forth the said George S. Bardon drove, operated and controlled the movements of said automobile under the direction of the said E. O. Johnson.

VIII.

That when said automobile with the occupants aforesaid arrived at a point within Cascade County, Montana, on said public highway where same has and takes its direction and course through the town of Simms, Montana, the said George S. Bardon,

while in the employ of the defendants as aforesaid and while under the direction of E. O. Johnson, drove and controlled said automobile in such a grossly negligent and reckless manner that said automobile while traveling at a speed of approximately between [47] fifty and sixty miles an hour was permitted by him to turn directly from and move off and from said public highway and crash into and collide with a large tree growing approximately twelve feet away from and to the side of said public highway in said Cascade County, Montana. That at the time and place on said highway when and where said automobile was permitted by the said George S. Bardon to leave said highway and collide with the tree aforesaid the said highway was approximately thirty feet wide in good and safe condition for travel by automobile and other means of conveyance and extended in an approximate straight line with a clear and unobstructed view for a distance of approximately one-half mile West and approximately one mile East from the place on said highway where the automobile driven at the time by aforesaid George S. Bardon was permitted by said George S. Bardon to leave the public highway and crash into the tree as aforesaid.

IX.

That by reason of said automobile being permitted by the said George S. Bardon and the said E. O. Johnson to move off of and away from the public highway and collide with and crash into the tree

as aforesaid the said Marguerite Doheny was thrown and hurled against the front seat and interior of the said automobile with great force and violence and her body was battered, bruised and cut and as a result thereof she suffered and sustained severe and serious bodily injuries and suffered great bodily pain and mental anguish and thereafter on or about the 12th day of December, 1934, as a result of the injuries sustained by her as [48] aforesaid Marguerite Doheny died all to her great damage in the sum of $50,000.00. That as a result of the injuries sustained at the time and place aforesaid Marguerite Doheny was compelled to employ the services of a physician and obtain special hospital care and attention and become obligated for the payment of same to her further damage in the sum of $50.00.

X.

That at the time of the grossly negligent and reckless operation of the automobile hereinabove referred to and the infliction of the injuries upon the said Marguerite Doheny, causing her death, said Marguerite Doheny was of the age of twenty years, in good health and was capable of earning and was earning the sum of approximately $60.00 per month.

Wherefore, plaintiff prays judgment against the defendants in the sum of $50,050.00 together with the costs and disbursements necessarily incurred in

and by reason of the within action and for such other and further relief as may be proper.

HALL & McCABE
Attorneys for Plaintiff. [49]

State of Montana
County of Cascade—ss.

E. J. McCabe being first duly sworn upon his oath deposes and says:

That he is a member of the law firm of Hall & McCabe, attorneys for the plaintiff named in the within and foregoing complaint and that, as one of said attorneys for plaintiff, affiant makes this affidavit of verification for and on behalf of plaintiff for the reason that said plaintiff is absent from Cascade County, Montana, wherein her attorneys reside and maintain their office and where this affidavit of verification is made;

That affiant has read the foregoing complaint, knows the contents thereof and that same is true to the best knowledge, information and belief of affiant.

E. J. McCABE.

Subscribed and sworn to before me this 11th day of June, 1935.

[Notarial Seal] ETHEL M. ROBINSON,
Notary Public for the State of Montana, residing at Great Falls, Montana.

My commission expires April 3, 1937.

[Endorsed]: Filed June 11, 1935 in state Court. [50]

PLAINTIFF'S EXHIBIT 15.

[Title of State Court and Cause.]

SEPARATE ANSWER OF DEFENDANT COVERDALE & JOHNSON, A CO-PARTNERSHIP.

Comes now the defendant Coverdale & Johnson, a co-partnership, and in answer to plaintiff's complaint on file herein admits, denies and alleges as follows:

I.

Answering paragraph I of the complaint this answering defendant admits the allegations therein contained.

II.

Answering paragraph II of the complaint this answering defendant admits that the defendants John M. Coverdale and E. O. Johnson were, on the 11th day of December 1934, and for sometime prior thereto, had been co-partners doing business under the firm, name and style of Coverdale & Johnson. This answering defendant denies each, every and all of the other allegations contained in said paragraph II.

III.

Answering paragraph III of the complaint this answering defendant admits that the defendant E. O. Johnson was on the 11th day of December 1934 the owner of a certain Ford V8 Sedan auto-[51] mobile and that the same bore Montana License plates Number 13-1865 for the year 1934.

This answering defendant denies each, every and all of the other allegations contained in said paragraph III.

IV.

Answering paragraph IV of the complaint this answering defendant admits that for a period of time prior to the 11th day of December 1934 one George S. Bardon was in the employ of the defendant partnership Coverdale & Johnson and directly connected with the performance by the defendant Coverdale & Johnson of that certain written contract theretofore entered into between said defendant and State of Montana through the Highway Commission, which contract is more particularly referred to in said complaint; this answering defendant denies that the said George S. Bardon was in the employ of defendant Coverdale & Johnson on the said 11th day of December 1934, or any time thereafter. This answering defendant denies each, every and all of the other allegations in said paragraph IV.

V.

Answering paragraphs V and VI of the complaint this answering defendant admits the allegations therein contained.

VI.

Answering paragraph VII of the complaint this answering defendant alleges that it has not sufficient information upon which to base a belief with respect thereto and therefore denies each, every and all of the allegations therein contained.

In this connection this answering defendant alleges that if the said Marguerite Doheny and her sister Roberta Doheny [52] did accompany the said defendant E. O. Johnson and the said George S. Bardon from Augusta to Great Falls, Montana and return on the said 10th day of December 1934 in said automobile owned by the said defendant E. O. Johnson, the said defendant E. O. Johnson and the said George S. Bardon had not been instructed or directed, or granted permission or authority by the defendant Coverdale & Johnson to invite, request, permit or allow any person and/or particularly the said Marguerite Doheny and Roberta Doheny to ride in said Ford V8 Sedan automobile belonging to the defendant E. O. Johnson on said trip from Augusta to Great Falls, Montana and return. This answering defendant further alleges that the defendant E. O. Johnson and/or George S. Bardon did not have any right, authority, permission or allowance from the defendant Coverdale & Johnson to permit or allow any person or persons and/or particularly said Marguerite Doheny and Roberta Doheny to ride in said Ford V8 Sedan automobile at said time and place.

This answering defendant further alleges that if the said Marguerite Doheny and Roberta Doheny did actually ride in said Ford V8 Sedan automobile belonging to the defendant E. O. Johnson at said time and place, with the said defendant E. O. Johnson and George S. Bardon, the said Marguerite Doheny and Roberta Doheny did so without the

consent, permission, invitation or authority of the defendant Coverdale & Johnson, and if the said Marguerite Doheny and Roberta Doheny did actually ride with the defendant E. O. Johnson and George S. Bardon in said Ford V8 Sedan automobile at said time and place, on the invitation or with the permission or consent of the defendant E. O. [53] Johnson, the said defendant E. O. Johnson was then and there acting on his own behalf and outside the scope of his authority given unto him by the defendant partnership Coverdale & Johnson and not in the transaction of the business of the defendant partnership Coverdale & Johnson and the said defendant E. O. Johnson was not then and there acting as a partner, servant or agent of the defendant partnership Coverdale & Johnson or acting in the course of his employment in inviting, permitting or allowing the said Marguerite Doheny and said Roberta Doheny to ride with him in the said automobile at the said time and place.

In this connection this answering defendant further alleges that if the said Marguerite Doheny and Roberta Doheny did actually ride in said Ford V8 Sedan at said time and place, with the defendant E. O. Johnson and George S. Bardon, on the invitation or with the permission or consent of George S. Bardon the said George S. Bardon was then and there acting in his own behalf and outside the scope of any authority, consent or permission given unto him by this answering defendant Coverdale & Johnson and the said George S. Bardon was not then

and there acting as a servant or agent of the defendant Coverdale & Johnson, or acting in the course of his employment in inviting, permitting or allowing the said Marguerite Doheny and Roberta Doheny to ride with him in said Ford V8 Sedan automobile.

This answering defendant further alleges that by reason of the aforesaid the said Marguerite Doheny and Roberta Doheny in so riding in said Ford V8 Sedan automobile were not invitees or guests of the defendant Coverdale & Johnson and further alleges that the death of the said Marguerite Doheny, if result- [54] ing from injuries received while riding in said Ford V8 Sedan automobile was not the result of any negligence or the result of any of the acts or omissions of this answering defendant Coverdale & Johnson.

VII.

Answering paragraph VIII of the complaint this answering defendant alleges that it has not sufficient information upon which to base a belief with respect thereto and therefore denies each, every and all of the allegations therein contained.

VIII.

Answering paragraph IX of the complaint this answering defendant admits that Marguerite Doheny died on or about the 12th day of December 1934. Further answering paragraph IX this answering defendant alleges that it has not sufficient information upon which to base a belief with re-

spect thereto and therefore denies each, every and all of the other allegations therein contained.

IX.

Further answering said complaint this answering defendant denies each, every and all of the allegations therein contained and not hereinbefore specifically admitted, qualified or denied.

Wherefore, having fully answered this answering defendant prays that the plaintiff take nothing by her complaint and that it recover its costs herein expended.

HOWARD TOOLE
W. T. BOONE
Attorneys for defendant,
Coverdale & Johnson. [55]

State of Montana
County of Missoula—ss.

W. T. Boone, being first duly sworn upon his oath, deposes and says: That he is one of the attorneys for the defendant Coverdale & Johnson in the above entitled action; that he makes this verification on behalf of said defendant, Coverdale & Johnson, a co-partnership, for the reason that none of the officers or agents of said co-partnership are within Missoula County, Montana, where affiant resides. That he has read the foregoing answer and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

W. T. BOONE.

Subscribed and sworn to before me this 23rd day of November, 1935.

[Seal] JOHN E. PATTERSON,
Notary Public for the State of Montana; residing at Missoula, Montana.

My commission expires April 22, 1937.

State of Montana
County of Missoula—ss:

Valborg Moe, being first duly sworn upon her oath deposes and says: that she is over the age of twenty-one years and is not interested in the above entitled action; that Hall & McCabe appear as attorneys of record for the plaintiff in said action, and have and maintain their office in the Strain Building at Great Falls, Montana; that Howard Toole and W. T. Boone appear as attorneys of record for the defendant Coverdale & Johnson in said action, and have and maintain their office in the Montana Building at Missoula, Montana. That there is a daily communication by mail between Missoula, Montana, and Great Falls, Montana; that on the 25th day of November, 1935, this affiant served a copy of the foregoing separate answer of defendant Coverdale & Johnson upon the attorneys for the plaintiff by depositing in the United States postoffice at Missoula, Montana, in a sealed envelope with postage paid, addressed to Hall & McCabe, Attorneys at Law, Strain Building, Great Falls, Montana, a true copy of said separate answer of Coverdale & Johnson.

VALBORG MOE.

Subscribed and sworn to before me this 25th day of November, 1935.

[Seal] W. T. BOONE,

Notary Public for the State of Montana; residing at Missoula, Montana.

My commission expires August 2, 1938. [57]

[Endorsed]: Filed Nov. 27, 1935 in state Court. [56]

PLAINTIFF'S EXHIBIT 16.

[Title of State Court and Cause.]

SEPARATE ANSWER OF DEFENDANT JOHN M. COVERDALE.

Comes now the defendant John M. Coverdale and in answer to plaintiff's complaint on file herein admits, denies and alleges as follows:

I.

Answering paragraph I of the complaint this answering defendant admits the allegations therein contained.

II.

Answering paragraph II of the complaint this answering defendant admits that the defendants John M. Coverdale and E. O. Johnson were, on the 11th day of December 1934, and for sometime prior thereto, had been co-partners doing business under the firm, name and style of Coverdale & Johnson. This answering defendant denies each, every and

all of the other allegations contained in said paragraph II.

III.

Answering paragraph III of the complaint this answering defendant admits that the defendant E. O. Johnson was on the 11th day of December 1934 the owner of a certain Ford V8 Sedan automobile and that the same bore Montana License plates Number [58] 13-1865 for the year 1934. This answering defendant denies each, every and all of the other allegations contained in said paragraph III.

IV.

Answering paragraph IV of the complaint this answering defendant admits that for a period of time prior to the 11th day of December 1934 one George S. Bardon was in the employ of the defendant partnership Coverdale & Johnson and directly connected with the performance by the defendant Coverdale & Johnson of that certain written contract theretofore entered into between said defendant and State of Montana through the Highway Commission, which contract is more particularly referred to in said complaint; this answering defendant denies that the said George S. Bardon was in the employ of defendant Coverdale & Johnson on the said 11th day of December 1934, or any time thereafter. This answering defendant denies each, every and all of the other allegations in said paragraph IV.

V.

Answering paragraphs V and VI of the complaint this answering defendant admits the allegations therein contained.

VI.

Answering paragraph VII of the complaint this answering defendant alleges that he has not sufficient information upon which to base a belief with respect thereto and therefore denies each, every and all of the allegations therein contained.

In this connection this answering defendant alleges that if the said Marguerite Doheny and her sister Roberta Doheny [59] did accompany the said defendant E. O. Johnson and the said George S. Bardon from Augusta to Great Falls, Montana and return on the said 10th day of December 1934, in said automobile owned by the said defendant E. O. Johnson, the said defendant E. O. Johnson and the said George S. Bardon had not been instructed or directed, or granted permission or authority by the defendant John M. Coverdale or by the defendant partnership Coverdale & Johnson to invite, request, permit or allow any person and/or particularly the said Marguerite Doheny and Roberta Doheny to ride in said Ford V8 Sedan automobile belonging to the defendant E. O. Johnson on said trip from Augusta to Great Falls, Montana and return. This answering defendant further alleges that the defendant E. O. Johnson and/or George S. Bardon did not have any right, authority, permission or allowance from the defendant John M. Coverdale

or the defendant partnership, Coverdale & Johnson to permit or allow any person or persons and/or particularly said Marguerite Doheny and Roberta Doheny to ride in said Ford V8 Sedan automobile at said time and place.

This answering defendant further alleges that if the said Marguerite Doheny and Roberta Doheny did actually ride in said Ford V8 Sedan automobile belonging to the defendant E. O. Johnson at said time and place, with the said defendant E. O. Johnson and George S. Bardon, the said Marguerite Doheny and Roberta Doheny did so without the consent, permission, invitation or authority of the defendant John M. Coverdale or the defendant partnership Coverdale & Johnson, and if the said Marguerite Doheny and Roberta Doheny did actually ride with the defendant [60] E. O. Johnson and George S. Bardon in said Ford V8 Sedan automobile at said time and place, on the invitation or with the permission or consent of the defendant E. O. Johnson, the said defendant E. O. Johnson was then and there acting on his own behalf and outside the scope of his authority given unto him by the defendant partnership Coverdale & Johnson and not in the transaction of the business of the defendant partnership Coverdale & Johnson and the said defendant E. O. Johnson was not then and there acting as a partner, servant or agent of the defendant partnership Coverdale & Johnson or acting in the course of his employment in inviting, permitting or allowing the said Marquerite Doheny and said Roberta Doheny to ride

with him in the said automobile at the said time and place.

In this connection this answering defendant further alleges that if the said Marguerite Doheny and Roberta Doheny did actually ride in said Ford V8 Sedan at said time and place, with the defendant E. O. Johnson and George S. Bardon, on the invitation or with the permission or consent of George S. Bardon the said George S. Bardon was then and there acting in his own behalf and outside the scope of any authority, consent or permission given unto him by this answering defendant or by the defendant partnership Coverdale & Johnson and the said George S. Bardon was not then and there acting as a servant or agent of the defendant John M. Coverdale or the defendant partnership Coverdale & Johnson, or acting in the course of his employment in inviting, permitting or allowing the said Marguerite Doheny and Roberta Doheny to ride with him in said Ford V8 Sedan automobile.

This answering defendant further alleges that by reason [61] of the aforesaid the said Marguerite Doheny and Roberta Doheny in so riding in said Ford V-8 Sedan were not invitees or guests of the defendant John M. Coverdale or the defendant partnership Coverdale & Johnson and further alleges that the death of the said Marguerite Doheny, if resulting from injuries received while riding in said Ford V8 Sedan automobile was not the result of any negligence or the result of any of the acts

or omissions of this answering defendant or of the defendant Coverdale & Johnson.

VII.

Answering paragraph VIII of the complaint this answering defendant alleges that he has not sufficient information upon which to base a belief with respect thereto and therefore denies each, every and all of the allegations therein contained.

VIII.

Answering paragraph IX of the complaint this answering defendant admits that Marguerite Doheny died on or about the 12th day of December 1934. Further answering paragraph IX this answering defendant alleges that he has not sufficient information upon which to base a belief with respect thereto and therefore denies each, every and all of the other allegations therein contained.

IX.

Further answering said complaint this answering defendant denies each, every and all of the allegations therein contained and not hereinbefore specifically admitted, qualified or denied.

Wherefore, having fully answered this answering defendant [62] prays that the plaintiff take nothing by her complaint and that he recover his costs herein expended.

HOWARD TOOLE
W. T. BOONE
Attorneys for defendant,
John M. Coverdale.

State of Montana
County of Missoula—ss.

W. T. Boone, being first duly sworn upon his oath, deposes and says: That he is one of the attorneys for the defendant, John M. Coverdale, in the above entitled action; that he makes this verification on behalf of said defendant John M. Coverdale, for the reason that said defendant is not now within Missoula County, Montana, where affiant resides. That he has read the foregoing answer and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

W. T. BOONE.

Subscribed and sworn to before me this 23rd day of November, 1935.

[Seal] JOHN E. PATTERSON,
Notary Public for the State of Montana; residing at Missoula, Montana.

My commission expires April 22, 1937. [63]

State of Montana
County of Missoula—ss.

Valborg Moe, being first duly sworn upon her oath deposes and says: that she is over the age of twenty-one years and is not interested in the above entitled action; that Hall & McCabe appear as attorneys of record for the plaintiff in said action, and have and maintain their office in the Strain Building at Great Falls, Montana; that Howard

Toole and W. T. Boone appear as attorneys of record for the defendant John M. Coverdale in said action, and have and maintain their office in the Montana Building at Missoula, Montana. That there is a daily communication by mail between Missoula, Montana, and Great Falls, Montana; that on the 25th day of November, 1935, this affiant served a copy of the foregoing separate answer of defendant John M. Coverdale upon the attorneys for the plaintiff by depositing in the United States postoffice at Missoula, Montana, in a sealed envelope with postage paid, addressed to Hall & McCabe, Attorneys at Law, Strain Building, Great Falls, Montana, a true copy of said separate answer of John M. Coverdale.

VALBORG MOE.

Subscribed and sworn to before me this 25th day of November, 1935.

[Seal] W. T. BOONE,

Notary Public for the State of Montana; residing at Missoula, Montana.

My commission expires Aug. 2nd, 1938.

[Endorsed]: Filed Nov. 27, 1935 in state Court.

[64]

PLAINTIFF'S EXHIBIT 17.

[Title of State Court and Cause.]

REPLY TO SEPARATE ANSWER OF DEFENDANT JOHN M. COVERDALE.

For reply to the separate answer of defendant, John M. Coverdale, herein the plaintiff admits, denies and alleges as follows:

I.

Denies that the said defendant E. O. Johnson and George S. Bardon had not been instructed or directed or granted permission or authority by the defendant Coverdale & Johnson to invite, request, permit or allow any person and particularly the said Marguerite Doheny and Roberta Doheny to ride in said Ford V8 Sedan automobile belonging to the defendant E. O. Johnson on said trip from Augusta to Great Falls, Montana, and return; and, denies that the defendant E. O. Johnson and George S. Bardon did not have any right, authority, permission or allowance from the defendant Coverdale & Johnson and defendant John M. Coverdale to permit or allow any person or persons and particularly said Marguerite Doheny and Roberta Doheny to ride in said Ford V8 Sedan automobile at the time and place referred to in paragraph VI of said answer.

Further replying to paragraph VI of said Answer plaintiff [65] denies that at the time of riding in said Ford V8 Sedan automobile belonging to defendant E. O. Johnson with the said defendant

E. O. Johnson and George S. Bardon the said Marguerite Doheny and Roberta Doheny did so without the consent, permission, invitation or authority of defendant Coverdale & Johnson and defendant John M. Coverdale; and, denies that at the time and place said Marguerite Doheny and Roberta Doheny rode in the said Ford V8 Sedan automobile on the invitation and with the permission and consent of the defendant E. O. Johnson that the said defendant E. O. Johnson was then and there acting on his own behalf and outside the scope of his authority given unto him by the defendant partnership Coverdale & Johnson and defendant John M. Coverdale; and, denies that such invitation, permission and consent was not in the transaction of the business of the defendant partnership Coverdale & Johnson and defendant John M. Coverdale; and, denies that the said defendant E. O. Johnson was not at the time then and there acting as a partner, servant or agent of the defendant partnership Coverdale & Johnson; and, denies that he was not then and there acting in the scope of his employment in inviting, permitting and allowing the said Marguerite Doheny and Roberta Doheny to ride with him in the said automobile at the time and place mentioned.

Further replying to said paragraph VI of defendant's answer plaintiff denies that at the time and place the said Marguerite Doheny and Roberta Doheny were riding in said Ford V8 Sedan at the time and place mentioned with the defendant E. O.

Johnson and George S. Bardon on the invitation and [66] with the permission and consent of said George S. Bardon that the said George S. Bardon was then and there acting in his own behalf and outside the scope of any authority, consent and permission given unto him by said defendant Coverdale & Johnson and defendant John M. Coverdale; and, denies that the said George S. Bardon was not then and there acting in the course of his employment in inviting, permitting and allowing the said Marguerite Doheny and Roberta Doheny to ride with him in said Ford V8 Sedan automobile.

Further replying to said paragraph VI of defendant's answer plaintiff denies that at the time and place the said Marguerite Doheny and Roberta Doheny were riding in said Ford V8 Sedan automobile they were not invitees or guests of the defendant Coverdale & Johnson and defendant John M. Coverdale; and, denies that the death of said Marguerite Doheny resulting in injuries received while riding in said Ford V8 Sedan automobile was not the result of any negligence or the result of any of the acts or omissions of said answering defendant Coverdale & Johnson and defendant John M. Coverdale.

Wherefore, having fully replied to the answer of said defendant John M. Coverdale plaintiff prays judgment in accordance with her complaint herein.

HALL & McCABE

Attorneys for Plaintiff. [67]

State of Montana
County of Cascade—ss.

E. J. McCabe being first duly sworn upon his oath deposes and says:

That he is one of the members of the co-partnership of Hall & McCabe attorneys for the plaintiff named in the within and foregoing reply and that as one of the attorneys for said plaintiff he makes this verification on behalf of said plaintiff for the reason that plaintiff is not within Cascade County, Montana where her attorneys reside and where this verification is made.

That affiant has read the foregoing reply, knows the contents thereof, and that same is true to the best knowledge, information and belief of affiant.

E. J. McCABE.

Subscribed and sworn to before me this 4th day of March, 1936.

[Seal] EDW. C. ALEXANDER,
Notary Public for the State of Montana. Residing at Great Falls, Montana.

My commission expires Sept. 11, 1938.

[Endorsed]: Filed March 5, 1936 in state Court.

[68]

PLAINTIFF'S EXHIBIT 18.

[Title of State Court and Cause.]

REPLY TO SEPARATE ANSWER OF DEFENDANTS COVERDALE & JOHNSON, A CO-PARTNERSHIP.

For reply to the separate answer of defendant, Coverdale & Johnson, herein the plaintiff admits, denies and alleges as follows:

I.

Denies that the said defendant E. O. Johnson and George S. Bardon had not been instructed or directed or granted permission or authority by the defendant Coverdale & Johnson to invite, request, permit or allow any person and particularly the said Marguerite Doheny and Roberta Doheny to ride in said Ford V8 Sedan automobile belonging to the defendant E. O. Johnson on said trip from Augusta to Great Falls, Montana, and return; and, denies that the defendant E. O. Johnson and George S. Bardon did not have any right, authority, permission or allowance from the defendant Coverdale & Johnson to permit or allow any person or persons and particularly said Marguerite Doheny and Roberta Doheny to ride in said Ford V8 Sedan automobile at the time and place referred to in paragraph VI of said answer.

Further replying to paragraph VI of said answer plaintiff denies that at the time of riding in said Ford V8 Sedan automo- [69] bile belonging to defendant E. O. Johnson with the said defend-

ant E. O. Johnson and George S. Bardon the said Marguerite Doheny and Roberta Doheny did so without the consent, permission, invitation or authority of defendant Coverdale & Johnson; and, denies that at the time and place said Marguerite Doheny and Roberta Doheny rode in the said Ford V8 Sedan automobile on the invitation and with the permission and consent of the defendant E. O. Johnson that the said defendant E. O. Johnson was then and there acting on his own behalf and outside the scope of his authority given unto him by the defendant partnership Coverdale & Johnson; and, denies that such invitation, permission and consent was not in the transaction of the business of the defendant partnership Coverdale & Johnson; and, denies that the said defendant E. O. Johnson was not at the time then and there acting as a partner, servant or agent of the defendant partnership Coverdale & Johnson; and, denies that he was not then and there acting in the scope of his employment in inviting, permitting and allowing the said Marguerite Doheny and Roberta Doheny to ride with him in the said automobile at the time and place mentioned.

Further replying to said paragraph VI of defendant's answer plaintiff denies that at the time the said Marguerite Doheny and Roberta Doheny were riding in said Ford V8 Sedan at the time and place mentioned with the defendant E. O. Johnson and George S. Bardon on the invitation and with the permission and consent of said George S.

Bardon that the said George S. Bardon was then and there acting in his own behalf and outside the scope of any authority, consent and permission given unto him by said defen- [70] dant Coverdale & Johnson; and, denies that the said George S. Bardon was not then and there acting as a servant and agent of the defendant Coverdale & Johnson; and, denies that the said George S. Bardon was not then and there acting in the course of his employment in inviting, permitting and allowing the said Marguerite Doheny and Roberta Doheny to ride with him in said Ford V8 Sedan automobile.

Further replying to said paragraph VI of defendant's answer plaintiff denies that at the time and place the said Marguerite Doheny and Roberta Doheny were riding in said Ford V8 Sedan automobile they were not invitees or guests of the defendant Coverdale & Johnson; and, denies that the death of said Marguerite Doheny resulting in injuries received while riding in said Ford V8 Sedan automobile was not the result of any negligence or the result of any of the acts or omissions of said answering defendant Coverdale & Johnson.

Wherefore, having fully replied to the answer of said defendant Coverdale & Johnson plaintiff prays judgment in accordance with her complaint herein.

HALL & McCABE

Attorneys for Plaintiff. [71]

State of Montana
County of Cascade—ss.

E. J. McCabe being first duly sworn upon his oath deposes and says:

That he is one of the members of the co-partnership of Hall & McCabe, attorneys for the plaintiff named in the within and foregoing reply and that as one of the attorneys for said plaintiff he makes this verification on behalf of said plaintiff for the reason that plaintiff is not within Cascade County, Montana where her attorneys reside and where this verification is made.

That affiant has read the foregoing reply, knows the contents thereof, and that same is true to the best knowledge, information and belief of affiant.

E. J. McCABE.

Subscribed and sworn to before me this 4th day of February, 1936.

[Seal] EDW. C. ALEXANDER,
Notary Public for the State of Montana, Residing at Great Falls, Montana.

My commission expires Sept. 11, 1938.

[Endorsed]: Filed March 5, 1936 in state Court.

[72]

PLAINTIFF'S EXHIBIT 19.

[Title of State Court and Cause.]

State of Montana
County of Cascade—ss.

AFFIDAVIT OF SERVICE

Marie V. Dionne being first duly sworn upon her oath deposes and says:

That she is over the age of twenty-one years and is not interested in the above entitled action;

That Hall & McCabe appear as attorneys of record for the plaintiff in said action and have and maintain their office at Great Falls, Montana; and, that Messrs. Howard Toole and W. T. Boone appear as attorneys of record for the defendants Coverdale & Johnson, a co-partnership, and John M. Coverdale personally in said action and have and maintain their office in the Montana Building at Missoula, Montana;

That there is a regular and daily communication by United States mail between Great Falls, Montana, and Missoula, Montana;

That on the 5th day of March, 1936, this affiant at the request of the above named attorneys for the plaintiff served copies of the replies of plaintiff to the separate answers of defendants Coverdale & Johnson and defendant John M. Coverdale [73] upon the attorneys for said defendants by depositing in the United States post office at Great Falls, Montana, true and correct copies of said replies and each thereof in a sealed envelope with postage

prepaid thereon addressed to Messrs. Howard Toole and W. T. Boone, Attorneys at Law, Montana Building, Missoula, Montana for transmission and delivery to said attorneys for said defendants in regular course of mail.

MARIE V. DIONNE.

Subscribed and sworn to before me this 5th day of March, 1936.

[Seal] E. McCABE,

Notary Public for the State of Montana. Residing at Great Falls, Montana.

My commission expires July 15, 1936.

[Endorsed]: Filed Mar. 5, 1936 in state Court.

[74]

PLAINTIFF'S EXHIBIT 20.

[Title of Court and Cause.]

VERDICT

We, the jury in the above entitled action, find in favor of the plaintiff, Ethel M. Doheny, as administratrix of the Estate of Marguerite Doheny, deceased, and against the defendants, John M. Coverdale and E. O. Johnson, co-partners doing business under the firm name and style of Coverdale & Johnson, in the sum of $5,000.00.

Dated this 2nd day of May, 1936.

CLARENCE W. WILSON,

Foreman.

[Endorsed]: Filed May 2, 1936 in state Court.

[75]

PLAINTIFF'S EXHIBIT 22.

[Title of State Court and Cause.]

NOTICE OF APPEAL

To: Ethel M. Doheny, Administratrix of the Estate of Marguerite Doheny, deceased, the plaintiff in the above entitled action, and to Messrs. Hall and McCabe, the plaintiff's attorneys and to each of you:

You and Each of You are hereby notified that John M. Coverdale, and Coverdale and Johnson, a co-partnership, defendants in the above entitled action, hereby appeal to the Supreme Court of the State of Montana, from that certain judgment made, given, returned, entered and filed in the above entitled action, in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, on the 4th day of May, 1936, as modified by that certain Order Taxing Costs and Disbursements, made, entered and filed in the above entitled action on the 15th day of May, 1936, which said judgment, as modified by said order is in favor of the plaintiff, Ethel M. Doheny, administratrix of the estate of Marguerite Doheny, deceased, and against the said defendants, John M. Coverdale and Coverdale and Johnson, co-partners, and is in the sum of five thousand ($5,000.00) dollars, principal, and interest from the date of said judgment until paid, at the rate of six (6) percent, together with plaintiff's costs, taxed in the sum of one hundred sixteen and [76] 89/100 ($116.89) dollars.

This appeal is from said judgment and from the whole thereof.

Dated this the 31st day of August, 1936.

HOWARD TOOLE
W. T. BOONE
Attorneys for John M. Coverdale and Coverdale and Johnson.

State of Montana
County of Missoula—ss:

Valborg Moe, being first duly sworn upon her oath deposes and says: that she is over the age of twenty-one years and is not interested in the above entitled action; that Hall & McCabe appear as attorneys of record for the plaintiff in said action, and have and maintain their office in the Strain Building at Great Falls, Montana; that Howard Toole and W. T. Boone appear as attorneys of record for the defendant Coverdale & Johnson in said action, and have and maintain their office in the Montana Building at Missoula, Montana. That there is a daily communication by mail between Missoula, Montana, and Great Falls, Montana; that on the 31st day of August, 1936, this affiant served a copy of the foregoing Notice of Appeal, upon the attorneys for the plaintiff by depositing in the United States postoffice at Missoula, Montana, in a sealed envelope with postage paid, addressed to Hall & McCabe, Attorneys at Law, Strain Building, Great Falls, Montana, a true copy of said Notice of Appeal.

VALBORG MOE.

Subscribed and sworn to before me this 31st day of August, 1936.

[Seal] W. T. BOONE,

Notary Public for the State of Montana; residing at Missoula, Montana.

My commission expires August 2nd, 1938. [78]

[Endorsed]: Filed Sept. 2, 1936 in state Court. [77]

PLAINTIFF'S EXHIBIT 23

[Title of State Court and Cause.]

NOTICE OF FILING REMITTITUR

To the above named Defendants and to Messrs. Howard Toole and W. T. Boone, their Attorneys:

You, and Each of You, will please take notice that on June 5, 1937 Remittitur from the Supreme Court of the State of Montana affirming the judgment in the above entitled court and cause was filed in the above entitled Court.

Dated this 5th day of June, 1937.

E. J. McCABE

H. C. HALL

Attorneys for Plaintiff.

[Endorsed]: Filed June 17, 1937, in State Court. [79]

PLAINTIFF'S EXHIBIT 24

[Title of State Court and Cause.]

EXECUTION WRIT

The State of Montana,

To the Sheriff of County of Deer Lodge, Greeting:

Whereas, on the 4th day of May, A. D. 1936 Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, deceased, recovered a Judgment in the said District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, against John M. Coverdale and E. O. Johnson co-partners doing business under the name and style of Coverdale &Johnson for the sum of Five Thousand and no/100 ($5,000.00) Dollars damages with interest from May 4, 1936 at the rate of six per cent per annum until paid; together with her costs and disbursements at the date of said judgment, and accruing costs amounting to the sum of One Hundred Sixteen and 89/100 ($116.89) Dollars as appears to us of Record.

And Whereas, the Judgment Roll, in the action in which said Judgment was entered, is filed in the Clerk's office of said Court, in the County of Cascade, and the said Judgment was docketed in said Clerk's office, in the said County, on the day and year first above written. And the sum of $5,116.89 with interest from May 4, 1936, at the rate of six per cent per annum is now (at the date of this writ) actually due on said Judgment.

Now, you the said Sheriff, are hereby required to make the said sum due on the said Judgment for damages, with interest as aforesaid, and costs and accruing costs, to satisfy the said Judgment, out of the personal property of the said debtors, or if sufficient personal property of said debtors cannot be found, then out of the real property in your county belonging to said debtors, on the day whereon said Judgment was docketed in the said County, or at any time thereafter, and make return of this Writ within sixty days after your receipt hereof, with what you have done endorsed thereon.

Witness: The Hon. C. F. Holt, Judge of the said Eighth Judicial District of the State of Montana, at the Court House in the County of Cascade, this 17th day of August A. D. 1937.

Attest: my hand and the seal of said Court, the day and year last above written.

[Seal] GEORGE HARPER
Clerk
By H. J. SKINNER
Deputy Clerk

Sheriff's Office

County of Deer Lodge, Montana

I hereby certify that I received the within Execution on August ....., 1937, and after checking in the county assessor's office and inquiring about town I cannot find any property belonging to John M.

Coverdale personally or belonging to the copartnership of John M. Coverdale and E. O. Johnson.

Dated this 31st day of August, 1937.

BARNEY L. LARSEN,
Sheriff,
By JOE SCHULTZ.
Under Sheriff.

[Endorsed]: Filed Sept. 8, 1937 in State Court.

[80]

PLAINTIFF'S EXHIBIT 25

In the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade.—Department No. 1.

No. 26273

ETHEL M. DOHENY, Administratrix of the Estate of Roberta Doheny,

Plaintiff,

vs.

JOHN M. COVERDALE and E. O. JOHNSON, Co-partners doing business under the firm name and style of COVERDALE & JOHNSON,

Defendants.

No. 26279

ETHEL M. DOHENY, Administratrix of the Estate of Marguerite Doheny,

Plaintiff,

vs.

JOHN M. COVERDALE and E. O. JOHNSON, Co-partners doing business under the firm name and style of COVERDALE & JOHNSON,

Defendants.

BILL OF EXCEPTIONS

Appearances:

For Plaintiffs:

Mr. E. J. McCabe (of Messrs. Hall & McCabe),.

Great Falls, Montana.

For Defendants:

Mr. Howard Toole and Mr. W. T. Boone, Missoula, Montana.

Before Hon. W. H. Meigs, Judge. [82]

[Title of Court and Cause.]

The above-entitled actions came on for trial on Wednesday, April 29, 1936, before the Hon. W. H. Meigs, Judge, sitting with a jury, duly empaneled and sworn, Mr. E. J. McCabe (of the firm of Messrs. Hall & McCabe) appearing as counsel for the plaintiff in each of said causes, and Mr. Howard Toole and Mr. W. T. Boone appearing as counsel for the defendants in each of said causes. Whereupon the

following testimony was introduced and proceedings had.

Mr. McCabe: May the record show that it is stipulated between the parties that the two cases of Ethel M. Doheny as Administratrix of the Estate of Roberta Doheny and Ethel M. Doheny as Administratrix of the Estate of Marguerite Doheny versus John M. Coverdale and E. O. Johnson will be tried together with the consent of both parties.

The Court: Let the record so show, and in the empaneling of a jury that counsel will have double the number of challenges as they are two separate cases; they are simply being tried together because the same facts, same counsel, same parties, for convenience and saving of time.

Plaintiff's Case

JACK THOMPSON,

Sworn as a witness for and on behalf of the plaintiff, in answer to questions put to him testified as follows:

Direct Examination

By Mr. McCabe:

Witness: My name is Jack Thompson. I reside in Great Falls and have resided here about twenty-two years. I am a photographer, and have been engaged in that occupation for about thirty years.

Q. On December 16, 1934, were you called upon to proceed to Simms, Montana, in Cascade County?

[84]

(Testimony of Jack Thompson.)

(Out of the hearing of the jury)

Mr. Toole: Now, if your Honor please, I will state to the Court before dictating the objection that the defendant Johnson has not been served in this action, the only two defendants being Coverdale and Johnson, and John M. Coverdale.

Now come the defendants John M. Coverdale and Coverdale & Johnson and object to the introduction of any evidence in this case upon the ground and for the reason that the complaint does not state a cause of action,

First, because it fails to allege that either of the said defendants were under any legal duty to protect the plaintiffs intestate, or that either of the defendants owed any legal duty to either of the Doheny girls; that the complaint further fails to allege that either of the defendants failed to perform any duty, any legal duty or other obligation, with respect to the Doheny girls; and that the complaint further fails to allege that the injury received by either of the Doheny girls was proximately caused by any breach of duty or any negligence or any delinquency of these defendants or either of them.

Second, the complaint fails to state a cause of action because it appears affirmatively from the face of the complaint that Marguerite Doheny and Roberta Doheny were riding in the automobile of E. O. Johnson at the time of the accident alleged in the complaint as the guests of E. O. Johnson and one George Bardon, and it appears affirmatively upon

(Testimony of Jack Thompson.)

the face of the complaint that George Bardon and E. O. Johnson, in permitting the two girls to ride as guests, were not then and there acting as agents or servants of the partnership or the defendant Coverdale, but were in fact acting solely upon a mission of their own and entirely outside of the scope of their authority and outside of the scope [85] of the business of the partnership.

Third, the complaint fails to state a cause of action because it fails to allege any facts upon which proof may rest of gross negligence and reckless operation; it fails to allege any duty owed to the Doheny girls with respect to the two defendants, or by the two defendants, in so far as the two girls were guests, under the Montana gross negligence act.

(Extended argument)

The Court: The motion will be denied.

A. I was.

(Witness continuing): I went down to Simms, Montana, that afternoon in company with you. In my business as photographer I am able to correctly portray by photograph, reproduce by photograph, the appearance of objects which I am called upon to take pictures of; and on that afternoon, or on December 16th, I took pictures of certain objects that were pointed out to me at that time. At that time I went to a garage or a place of storage in Simms, Montana, known as Malmgren's garage, where I saw an automobile, a Ford Sedan. There were no other automobiles in the garage at that

(Testimony of Jack Thompson.)

time. I am able to identify Plaintiff's proposed Exhibit No. 1, which you show me; it is a picture which was taken at that time in the Malmgren garage, and correctly or accurately sets forth the objects in that picture as they appeared at that time. Plaintiff's proposed Exhibits numbered 3, 4, 5, 6 and 7, I am able to identify; they are pictures which were taken by me at that time, and each of these exhibits correctly and accurately portrays and shows the appearance of the automobile appearing therein as it existed at that time. I am also able to identify Plaintiff's Exhibit No. 8, which is a picture I took on that afternoon. It is a picture of the public highway, looking east, [86] running through the town of Simms, known as the Great Falls-Augusta Highway, generally; it correctly and accurately portrays the condition of that highway as it existed and appeared at that time at the point where the picture was taken. The picture was taken approximately within the town of Simms. It shows the highway as extending east from the point where I took the picture. At that time my attention was called to a large poplar, or a large tree, to the side of the road, and the picture correctly portrays the poplar tree shown at that time. I have marked on that exhibit, at your request, by the word "Tree" the tree which was pointed out to me at that time. I later took a picture of that tree, which is Plaintiff's proposed Exhibit 11, which correctly portrays and shows the tree, the object

(Testimony of Jack Thompson.)

which it purports to represent, as it existed at that time. The tree shown in Exhibit 11, which I have indicated by the word "Tree" and "X" appearing on Plaintiff's Exhibit No. 8 is the same tree.

I am able to identify Exhibit No. 9 for Plaintiff as a picture taken at the same time, which represents another part of the same public highway running through the town of Simms, and shows the highway extending west. I have, at your request, on Exhibit No. 9, indicated by the word "Tree" the tree, which I examined at that time and which had some bark scarred on it at that time, and it is the same tree as appears on plaintiff's proposed Exhibit No. 11.

Exhibit No. 10 for Plaintiff is a picture that was taken at the same time, shows the highway looking west, and is a closer-up view of the tree involved in this matter. I have now indicated on Exhibit 10 by the word "Tree" and the letter "X" the tree in question, which is the same one as appearing in Plaintiff's proposed Exhibit No. 11. [87]

On each of these proposed exhibits, and on the back of them, appear the words "J. K. Thompson, 12/16/34," which I put on them so I could identify them.

(No cross examination)

(Witness excused)

R. J. WOODWARD,

sworn as a witness on behalf of the plaintiff, in answer to questions put to him testified as follows:

Direct Examination

By Mr. McCabe:

Witness: My name is R. J. Woodward. I reside in Great Falls. I am a Civil Engineer in the employ of the State Highway Commission, and am at the present time employed by the State Highway Commission of the State of Montana. Have been so employed eight years.

I am acquainted with the public highway within the State of Montana known as the Great Falls-Augusta Public Highway, the one extending from Great Falls, Montana, to Augusta, Montana. That part of that road which extends from Sun River bridge at a point east of Simms, Montana, to Augusta, is also known and designated as the Augusta-Sun River road. The width of that public highway at the time it was first constructed was twenty-four feet from shoulder to shoulder, and by reason of use of that highway it has become considerably wider, so that on or about December 11, 1934, its width varied from about 27 feet up to about 32 feet, and where it goes through the town of Simms it was approximately 30 feet,—29 to 31 feet.

(No cross examination)

(Witness excused) [88]

Mr. McCabe: Now, if your Honor please, there have been two depositions that were taken of the witnesses Clair Garrity and E. Bernhardt, and we ask the Clerk to open them at this time so that they may be received in evidence.

May the record show that the stipulation appearing on each of the depositions of witnesses Clair Garrity and E. Bernhardt in the two cases on trial were signed by the respective attorneys for plaintiff and defendant.

The Court: The record may so show.

Mr. McCabe: The first deposition I am proceeding to read from is in the case of the Administratrix of the Roberta Doheny Estate.

The Deposition of Ed Bernhardt taken, pursuant to stipulation, before Jack Raftery, a Notary Public in and for the State of Montana, at his office in the County of Lewis and Clark on the 24th day of April, 1936, commencing at 10 o'clock A. M.

E. BERNHARDT

was called as a witness, pursuant to stipulation and, being sworn, testified as follows:

Direct Examination

By Mr. McCabe:

Witness: My name is Ed Bernhardt; they all call me Ed, but I sign my name "E". I reside at 500 Leslie Avenue, Helena, Montana. During the months of November and December, 1934, I was residing

(Deposition of E. Bernhardt.)

at the Randall Hotel in Augusta. I am acquainted with John M. Coverdale, and am acquainted with Mr. E. C. Johnson, and was acquainted with those men in November and December, 1934. In November and December, 1934, I was employed by the firm of Coverdale and Johnson; I had a truck rented to them; I was hauling gravel; you could call it being hired by them to drive this truck; it was by the hour, the truck I was renting to them: they paid me by the hour for my own services and the use of my truck. I was employed by them only two months. I commenced my work around the 10th of November. My work was not continuous for two months [89] thereafter; what I mean by that: I would get caught up with my work and go back to Helena again; I did that two or three times, but a majority of the time I was employed by Coverdale and Johnson.

I was employed by Coverdale and Johnson on the 10th day of December, 1934, and at that time was employed by them in connection with transporting an Ersted, 2-drum hoist, with tractor power, between Augusta, Montana, and Great Falls, Montana. Mr. Johnson on that 10th day of December, 1934, told me to haul it to Great Falls; it was to be taken direct to Blakeslee's yard in Great Falls. He told me as soon as I got ready to leave to start with it for Great Falls. That was 4 o'clock in the afternoon when I loaded it. At that time he said he would meet me in Great Falls, and he told me he

(Deposition of E. Bernhardt.)

would help me unload it and show me where to take it. I wasn't acquainted in Great Falls. After he told me this, I loaded it; it took about an hour and a half to load the hoist; then I had dinner in Augusta after I had loaded it. Then I left with the hoist for Great Falls. This hoist was not mounted on an automobile truck, it was just a Fordson Tractor, and the only thing I had to do with it was haul it to Great Falls. I drove the conveyance that transported the hoist.

I saw Mr. Johnson that evening in Great Falls, Montana, I imagine it was 10:30. At that time I wasn't acquainted with Roberta Doheny; I knew her by sight, knew who she was. I was acquainted with Marguerite Doheny at that time.

Q. Did you see either Marguerite Doheny or Roberta Doheny with Mr. Johnson in Great Falls?

Mr. Toole: That is objected to as irrelevant and immaterial.

The Court: Overruled.

A. Yes. [90]

Witness: With Mr. Johnson, when I saw him, were George Bardon, Harry Ballard—not Harry, but his last name was Ballard—and Herb Jenson.

Q. When you saw Mr. Johnson and Mr. Bardon, the two girls and these other two men, where were they with respect to Mr. Johnson's Ford automobile?

Mr. Toole: May we have the same objection, so far as the two Doheny girls are concerned, with respect to the Coverdale partnership?

(Deposition of E. Bernhardt.)

The Court: If there is nothing new, yes; if there is anything special I would like to have it called to my attention.

Mr. Toole: Very well.

A. They were in the Mint at a table.

Witness: After I saw Mr. Johnson I did not immediately leave, we sat there and drank one glass of beer and then left. When I left I saw Mr. Johnson, both the Doheny girls, Mr. Bardon and Jenson and Ballard in the automobile. After I left the Mint I went down to Blakeslee's yard in Great Falls; I followed Mr. Johnson and these other persons down there, all of whom were in the car during all of the period of time from the time I left the Mint until I arrived at Blakeslee's yard. George Bardon was driving the automobile at that time.

Q. Prior to this time, did you know whether Mr. Bardon was in the employ of Coverdale and Johnson?

Mr. Toole: Objected to as immaterial.

The Court: He asks if he knows; overruled.

A. Yes, sir, he was.

Witness: I saw him do work around the contract work on the highway in which Coverdale and Johnson were engaged. He was [91] timekeeper. Mr. Coverdale or Mr. Johnson were present at times when I was present, in which Mr. Bardon was keeping time.

(Deposition of E. Bernhardt.)

When we arrived at the Blakeslee yard we unloaded the hoist after looking about a half an hour to find a place to put it. Mr. Johnson, Mr. Ballard and Mr. Jenson helped me to actually unload the hoist. During this time Bardon and the two girls were sitting in the car. Mr. Bardon turned the car around to shine the lights on us so we would have light to see where we were unloading the hoist. He did that at the direction of Mr. Johnson. It took us, I would say, very close to an hour to unload the hoist. I imagine that it was 10:30 that I first saw Mr. Johnson on that evening at the Mint, after I arrived in Great Falls.

I was acquainted with the location of the work being done under the highway contract by Coverdale and Johnson on the Augusta-Sun River road. The work consisted of wooden piling overpasses and one concrete bridge. As to the work being all around one place on the highway or scattered different places, it was scattered all over, on the Great Falls road for a distance of ten miles, and on the Choteau road I imagine 5 miles. I did not remain in the employ of Coverdale and Johnson until they completed the work under this contract; they were still working when I terminated my employment. Prior to the 10th day of December, 1934, Mr. Coverdale had been present in connection with the work, and Mr. Johnson had been present in connection with it.

(Deposition of E. Bernhardt.)

Q. Did you hear Mr. Johnson or Mr. Coverdale instruct the men in their employ, men on the work, working at the time, as to the performing of any of the work?

Mr. Toole: Objected to as immaterial, not tending [92] to prove any issue in the case.

The Court: I cannot determine yet; it might.

Mr. McCabe: The only purpose is to show that both men were present working on the job, giving directions.

Mr. Toole: Objected to because it does not fix the time; it is immaterial; too remote; does not prove any issue in this case, and because nothing stated by Coverdale at that time and place to have any bearing on the issues in the case.

The Court: Overruled, because the young man says he was only working there about two months and, if it is not germane, later you can make motion to strike.

A. Yes.

Witness: Prior to the 10th day of December Mr. Coverdale went away and left the work, and Mr. Johnson remained in custody, present on the work. I was acquainted with Mr. Coverdale's Plymouth Sedan automobile, and was acquainted with Mr. Johnson's automobile, a 1934 V-8 Ford Sedan.

Q. Do you know whether those automobiles were used for or by Mr. Coverdale and Johnson in connection with the work under the highway contract?

(Deposition of E. Bernhardt.)

Mr. Toole: That is objected to because it is immaterial, does not tend to prove or disprove any of the issues in this case, it being immaterial as to what purposes Johnson's and Coverdale's automobiles were used for in connection with the work, it being of course defendants' contention that that does not entitle the Doheny girls to ride in Johnson's automobile and does not bind the defendants Coverdale and the partnership.

The Court: One of the instrumentalities used by [93] the partnership in going to the place where some equipment would be unloaded. It will be overruled.

A. Yes.

Q. And did you see Mr. Johnson and Mr. Coverdale drive those automobiles during the period of time of this employment by Coverdale and Johnson?

Mr. Toole: Same objection.

The Court: Overruled.

A. Yes, sir.

Q. What did you see, during that time, Mr. Coverdale and Mr. Johnson do, with reference to driving those automobiles?

Mr. Toole: We make the same objection to that as made to the previous question, particularly with reference to the automobile of Coverdale; it is not involved at all.

(Deposition of E. Bernhardt.)

The Court: The automobile of Mr. Coverdale is not involved, no, and it ought to be limited to Mr. Johnson's car, I think.

Mr. McCabe: I don't like to make this statement in the presence of the jury, but I would like to state the purpose.

The Court: No, if it is in the matter of evidence, but it would seem now that if Mr. Coverdale had a car that he was using in his work and didn't hurt anybody, that we wouldn't be concerned with it. The only feature of it—well, I think that that is far enough. Unless something is connected up now, I will sustain the objection with reference to Coverdale's car.

Mr. McCabe: Then the answer refers to that in the plural. [94]

The Court: Can't you by agreement make it singular?

Mr. McCabe: I don't think we can.

The Court: Let me see it.

Mr. McCabe: I think I should be permitted to state the purpose of it; it becomes very material.

The Court: Sustain the objection.

Mr. McCabe: But with leave later on——

The Court: Yes, naturally, but I think that whole page will have to be sustained.

Mr. McCabe: Then I think we can shorten this by stating the purpose of it in the absence of the jury, because it absolutely ties me up unless I can state my purpose to the Court.

(Deposition of E. Bernhardt.)

The Court: Let me look at it further on . . . I will have to sustain the objection.

Mr. McCabe: May I ask leave of the Court to later state the purpose?

The Court: Yes.

Q. During that period of time, from the time you first went to Augusta in the employ of Coverdale and Johnson until a time approximately two months later when you left their employ, did you ever see any other persons riding in Mr. Coverdale's car or automobile, being at the time driven by Mr. Coverdale, on the road or highway which extends from Augusta, Montana, to Great Falls, Montana?

The Court: I would think, Mr. McCabe, if I may interrupt, that the objection is going to be to all the balance of this clear down to cross-examination. You might read the question; I think the objection would [95] have to be sustained. It might be that it would be better not to read at this time, unless you wish.

Mr. McCabe: Then we get to the question of Mr. Johnson's automobile:

Q. Did you ever, during that period of time, see persons other than persons in the employ of Coverdale and Johnson being transported in Mr. Johnson's automobile on the same highway at the time Mr. Johnson was driving his automobile?

(Deposition of E. Bernhardt.)

Mr. Toole: That is objected to as being immaterial, there being nothing about the evidence which would tend to prove any of the issues in this case, it being immaterial as to whether or not Johnson hauled other people from time to time.

The Court: It may be attempting to show a habit on his part of hauling people.

Mr. Toole: May I have objection also that the rides were given in the course of the partnership business,—being incompetent to prove that any rides were given in the course of partnership business.

The Court: That is what it says, in his operating his business, immediately before. I think you can answer with reference to Mr. Johnson.

A. Yes.

Q. And how many times would you say you saw such persons being driven in Mr. Johnson's automobile?

Mr. Toole: Same objection.

The Court: Same ruling.

A. I would say, in Mr. Johnson's car, nearly every day.

Q. During that same period of time did you ever see persons, other than persons in the employ of Coverdale and Johnson, being [96] transported in

(Deposition of E. Bernhardt.)
an automobile in which Mr. Coverdale or Mr. Johnson were present?

Mr. Toole: Objected to on the ground it is immaterial.

The Court: That brings the knowledge home to the partnership. Overrule the objection.

A. Yes.

Q. In whose automobile was it that you saw such persons being transported?

Mr. Toole: Same objection.

The Court: Same ruling.

A. Mr. Johnson's.

Cross Examination

By Mr. Boone.

Witness: I owned the truck, which I rented to Coverdale and Johnson. In connection with my duties I was hauling gravel or piling and guard rails. On December 10, 1934, I was not on the construction work all that day; I arrived on the job about 4:30 in the afternoon. The hoist which I later took to Great Falls was not then in operation, not when I arrived. They had finished using that hoist sometime that afternoon, but I couldn't say what time it was; I know that it was sometime in the afternoon, and I would say early in the afternoon, but I don't know what time it was. I did not know where Blakeslee's yard was in Great Falls. I had been to Great Falls before.

(Deposition of E. Bernhardt.)

I assisted with the unloading of the hoist. It was necessary that others help me unload it.

I have related that Mr. Bardon was present in Great Falls when the hoist was unloaded. In the course of my employment with Coverdale and Johnson, I had occasion to observe the hours [97] worked by Mr. Bardon as timekeeper. He didn't have any regular hours; I lived in the same room with Mr. Bardon and some evenings when he was behind with his work he worked up until 1 or 2 o'clock in the morning. The work that he was doing was on the job as timekeeper. Once in a while he would haul something to the depot or when we needed something he would do it. On December 10, 1934, he was timekeeper. I don't know on that particular day when he went to work; I don't know whether he went out on day shift or whether it was in the afternoon. In December the afternoon shift was in force; there was a morning shift also. As to whether Mr. Bardon was on the morning shift or the afternoon shift, Mr. Bardon didn't have any shift; I couldn't say; he worked all of the time; there was no thirty hours connected with the timekeeper. I observed him as timekeeper checking time on the job of the other employees; that was his duty.

When I arrived at the Blakeslee Yard in Great Falls to unload the hoist, Mr. Bardon stayed in the car, and Marguerite and Roberta Doheny also stayed in the car at that time. Mr. Bardon didn't

(Deposition of E. Bernhardt.)

get out of the car at all at the Blakeslee yard, and offered no assistance whatever in unloading the hoist outside of turning the lights on, but he never got out of the car nor handled any part of the hoist itself.

I don't know of my own knowledge who invited Marguerite Doheny and Roberta Doheny to ride to Great Falls on that particular occasion, and do not know when the invitation was extended or made to the girls. Marguerite and Roberta Doheny did not assist in unloading the hoist, nor take any part in connection with the work, nor have any relation to that work. When I came out of the Mint I saw Mr. Johnson, Mr. Bardon and the two Doheny girls get into the Johnson car. I couldn't say the positions [98] taken by the parties in the car, or whether Marguerite was in the front seat or back seat. The car in which Mr. Bardon, Mr. Johnson and the two Doheny girls were riding in Great Falls was owned by Mr. Johnson, that is, to my knowledge.

Redirect Examination

By Mr. McCabe.

Witness: As to the other duties that Mr. Bardon performed besides that of timekeeper, well, if anything arrived at the depot, George would get it, any parts to be ordered and on two or three different occasions he helped me load guard rail posts when we were short of help. I have heard Mr.

(Deposition of E. Bernhardt.)

Johnson make requests to Mr. Bardon on other occasions to do work other than that of timekeeper; he asked him to help me unload guard rails, guard rail posts.

Q. During the times in which you saw Mr. Bardon employed by Coverdale and Johnson as timekeeper on this job, did you ever see him drive Mr. Coverdale's car back and forth?

Mr. Toole: Objected to as immaterial; same objection as made to the first question.

The Court: Overrule the objection. Apparently in addition to being timekeeper you might call him a general utility man.

A. Yes.

Q. At the time he was driving the car, do you know what the purpose was, what kind of work he was doing, if any, in connection with the driving of the car?

Mr. Toole: Objected to for the same reason.

The Court: Overruled.

A. Yes, sir.

Q. What was it?

A. In the evenings on different occasions he took one fireman [99] to the bridge to keep the fire under the bridge; it was cold and they had just poured the cement.

Q. In taking that man to the bridge, did you see Mr. Bardon drive the automobile? A. Yes.

(Deposition of E. Bernhardt.)

Q. Whose automobile was it?

Mr. Toole: That is objected to as immaterial.

The Court: Overrule the objection.

A. He used Mr. Coverdale's and Mr. Johnson's car, both, at different times.

Q. Did you ever see Mr. Bardon driving their automobiles in which persons were being transported between Augusta and the work?

Mr. Toole: Same objection.

The Court: Overruled.

A. Yes.

Q. Approximately how many times did you see him driving an automobile in transporting such persons?

Mr. Toole: That is objected to as immaterial.

The Court: Overruled.

A. I would say three or four times a week.

Q. Did that extend over the period of time which you worked there? And when I say "when you worked there," I mean when you were employed by Coverdale and Johnson. A. Yes.

Recross Examination

By Mr. Boone.

Witness: I have stated that on occasions Mr. Bardon, in addition to his duties as timekeeper, transported certain boards to the job and also

(Deposition of E. Bernhardt.)
helped me unload boards and equipment. However, those chores or duties never took him out of Augusta other [100] than from Augusta to the job. In other words, I would say that his work was confined to the territory at Augusta, from Augusta to the job.

Mr. McCabe: Then a motion was made by Mr. Boone; I don't know whether they want to renew it at this time or not.

Mr. Toole: Yes, I want to make that motion. Now comes the defendant John M. Coverdale, individually, and the defendants Coverdale and Johnson, partnership, and move to strike out that portion of the testimony given by the witness which relates to the transportation of people by the defendant Coverdale.

The Court: It has not been admitted yet.

Mr. Toole: All the last part with reference to Coverdale's car, that was with reference.

The Court: That is all right then, to strike that, if there is any reference to Mr. Coverdale.

Mr. Toole: Now I move to strike all that portion of the evidence of this witness with respect to transportation of people by George F. Bardon in the automobile owned by Coverdale, on the ground it is irrelevant and immaterial, does not tend to prove any issues in this case.

(Deposition of E. Bernhardt.)

The Court: Overruled; it shows employment—for the consideration of the jury—by the partnership.

Mr. McCabe: May the record show that the substance of this deposition will also be deemed to have been read in the Marguerite Doheny estate case as to the defendants Coverdale and Johnson.

The Court: Yes. [101]

(Jury admonished and excused until 9:30 a. m., April 30, 1936.)

Mr. McCabe: Now, if your Honor please, the purpose of the testimony set forth in the deposition, and the objections to which concerning questions were sustained, is to show that in addition to the Johnson car being used for the purpose of transporting not only laborers and persons employed on the work, that the Coverdale car likewise was employed while they were performing the work in transporting also persons, that those persons not only constituted men in the employ, but persons living along the road and other persons that had no connection with the employment, and that this was a constant practice, both Mr. Coverdale and Mr. Johnson were doing this, and the evidence further shows that on two different occasions this transportation of passengers by Mr. Coverdale and Mr. Johnson was done while Mr. Coverdale, in one case, was in Mr. Johnson's car

when he was transporting these passengers and these strangers, as well as men who were on the job, and another occasion when Mr. Johnson was in Mr. Coverdale's car transporting, and that this practice extended over such a period of time that Mr. Coverdale knew or, in the exercise of ordinary care or ordinary enquiry, should have known, he being on the job, the purpose for which both instrumentalities were being used, he knew his own was being used for this purpose in connection with the partnership work, and he knew on one occasion Mr. Johnson was using his car for that purpose, and this was extending over such a period of time which brings it within the rule which states that where it is shown by the evidence that the cars were used for the purpose of transporting passengers for a period of time that the inference may be drawn, and both partners knew of it and acquiesced and consented to it, and thereby extended, impliedly at least, the [102] ostensible powers of each party and authorities.—66 Fed. (2d) 678.

The Court: Objection is that the mere fact Coverdale transported persons in his automobile is no reason or excuse or authority for Johnson doing the same thing,—that is the sum and substance?

Mr. Toole: Yes.

Mr. McCabe: Yes, your Honor. But the purpose of this testimony is to show that both of them had knowledge of each of the other's trans-

porting passengers with the cars of the business.

The Court: That is exactly what I wanted the authority on, that question.

Mr. Toole: Section 7997, 7998, subdivision 7.

The Court: The Court will stand adjourned until tomorrow morning at 9:30.

Thursday, April 30, 1936, 9:30 A. M.

The Court: Have you gentlemen any other cases or do you wish the jury to retire during the ruling on this question?

Mr. Toole: No, not as far as I am concerned.

Mr. McCabe: No, I don't think it will be necessary for them to retire during the ruling.

The Court: The question was the knowledge or the acts of Mr. Coverdale with reference to hauling people in his car. The objection to that will be sustained as to what he did himself.

As to whether he did or not have knowledge of Mr. Johnson can be shown. The principle is somewhat like "Bobby did this and I have a right to do it too." It is not what Coverdale did but what Johnson did; but if Coverdale knew what Mr. Johnson [103] was doing, that can be shown, in addition to whether he knew it or not, if it was done within the scope of the partnership. Of course, all these things are going to come up later again and will likely be considered again.

Mr. McCabe: Now, if your Honor please, we

desire at this time now to have entered into the record the deposition of Clair Garrity.

The deposition of Clair Garrity taken, pursuant to stipulation, before Jack Raftery, a Notary Public in and for the State of Montana, at his office in the County of Lewis and Clark, on the 24th day of April, 1936.

CLAIR GARRITY

called as a witness, pursuant to stipulation, and being duly sworn testified as follows:

Direct Examination

By Mr. McCabe.

Witness: My name is Clair Garrity. I reside at 100 North Rodney Street, Helena, Montana. In the early part of December, prior to the 11th of December, I was residing at the Randall Hotel at Augusta, and had resided there approximately between four and five months prior to that time. In December, 1934, I was acquainted with John M. Coverdale, and at that time I was acquainted with Mr. E. O. Johnson. Mr. Coverdale and Mr. Johnson, to whom I refer, were operating in connection with a certain road or highway contract up there under the name of Coverdale and Johnson. I was not employed by Coverdale and Johnson. I was not employed at any time during the month of December, 1934, by John M. Coverdale, nor by Mr. E. O. Johnson. On the 10th of De-

(Deposition of Clair Garrity.)

cember, 1934, I had a conversation with Mr. Johnson, of the firm of Coverdale and Johnson, relative to going to Great Falls, Montana. [104]

Q. What was that conversation?

Mr. Toole: That is objected to now for the reason that those statements of Mr. Johnson, in so far as these two Doheny girls are concerned, with respect to the trip to Great Falls, would not be binding upon the partnership nor upon Mr. Coverdale.

The Court: I presume it is connected up, Mr. McCabe?

Mr. McCabe: I think the next question eliminates the objection.

Q. Did you see Oscar Johnson at Augusta, Montana, on the 10th of December, 1934?

A. I am not exactly sure of the dates.

Q. Well, to refresh your recollection: In the early part of December, did you learn of a collision of a car which belonged to Mr. Johnson, on the Augusta-Great Falls highway in which persons were injured?

A. Yes, I heard about the accident.

Q. With respect to the time you heard this about this accident, or with respect to the day you heard it, what was the day on which you had a conversation with Mr. Johnson relative to going to Great Falls?

(Deposition of Clair Garrity.)

A. It was the night before I heard of this accident that I talked to Mr. Johnson.

Q. What did Mr. Johnson say to you at that time?

Mr. Toole: Now, the objection I stated a moment ago is made to this question.

Mr. McCabe: The answer was not given.

Q. Well, Mr. Garrity, at that time what did you say to Mr. Johnson?

Mr. Toole: That is objected to for the same reason; [105] no statements by Mr. Garrity would be binding under any circumstances about the partnership.

The Court: No, but if it is about partnership business——

Mr. McCabe: I think it is all connected up; I couldn't cover it in one question.

The Court: No, you could not, and I will have to take your statement in connection with that, with motion to strike if not proper.

A. I asked Mr. Johnson if I could ride to Great Falls with him.

Q. And what did he say to you at that time?

Mr. Toole: That is objected to for the same reason; and I move to strike the answer previously made to the previous question on the ground and for the reason that no statements made by Mr. Garrity could in any respect bind the partnership nor Mr. Coverdale, nor could

(Deposition of Clair Garrity.)

any conduct on his part bind the partnership or Mr. Coverdale.

The Court: Well, it all depends whether it was on partnership business or not. It may come up later, and you will make your notations to present a motion to strike, if you wish.

A. He told me that he was going to Great Falls that night and that I could go with him in his car.

Q. What did he say was his purpose in going to Great Falls?

Mr. Toole: That is objected to upon the ground and for the reason that so far as these plaintiffs are concerned and plaintiffs intestate, no statement by Mr. Johnson could be binding on Mr. Coverdale or on the [106] partnership.

The Court: Objection overruled.

A. Mr. Johnson told me that he had a driver ahead of him on the road, hauling a hoist to Great Falls; that the driver wasn't acquainted in Great Falls and that he was going in to show him where this hoist should be unloaded.

Witness: I had been acquainted with Mr. Coverdale and Mr. Johnson, prior to the 10th day of December, 1934, approximately the same length of time I resided at the Randall Hotel; that is where I first met them; I think it was between four and five months. I was acquainted with the automobile that was operated or owned by Mr. Johnson. I am not acquainted with the time when Coverdale

(Deposition of Clair Garrity.)

and Johnson began operations or work in connection with the highway contract which I said they worked on, the Augusta-Sun River highway; they started work before I got there, and prior to my arrival they were working on this state highway project.

Q. Now, had Mr. Johnson, during that period of time in which Coverdale and Johnson were employed on this highway contract, concerning which you have testified, ever transported you in his car or his automobile on that road, to points on that road, which extends between Augusta, Montana, and Great Falls, Montana?

Mr. Toole: Objected to because it is immaterial as to whether Johnson hauled this man Garrity or anyone else on that road, not being shown that the Doheny girls were along at that time; and it is further objected to for the reason that the conduct of Mr. Johnson in hauling Mr. Garrity outside of the presence of Mr. Coverdale would not be binding upon Mr. Coverdale, and could not be binding upon the partnership; and it is further objected to because it is not shown that he was hauling [107] Mr. Garrity in any matter in connection within the partnership business or within the scope of his own authority.

The Court: The objection will be overruled because it has a bearing on the question as to whether the transportation and the invitation

(Deposition of Clair Garrity.)

to the Doheny girls was not an accident or a mistake on the part of Johnson; similar acts would be admissible for that purpose.

A. Yes, I have ridden with Mr. Johnson.

Q. How many times would you say Mr. Johnson had ridden you or driven you in his automobile, as you have testified to, during that period of time?

Mr. Toole: Same objection: I call to your Honor's attention that it does not say between Great Falls and Augusta.

The Court: The previous question did.

Mr. McCabe: Different points on that road where they were working.

The Court: The first question, as I understood, called attention to that fact, along where they were working, and this is following up right at the same time.

Mr. McCabe: This is following the same thing.

The Court: He may answer.

A. I have ridden numerous times with Mr. Johnson, but I couldn't state how many; it has been considerable.

Q. Could you say approximately the total number of times?

A. Oh, I would say probably 20 or more.

Q. Mr. Garrity, on any of these occasions on which you rode with Mr. Coverdale, was Mr. Johnson present in the car?

(Deposition of Clair Garrity.)

Mr. Toole: Objected to for the reasons stated. [108]

The Court: Overruled.

A. Yes.

Q. And when you were riding with Mr. Johnson, as you have testified, in his automobile, was Mr. Coverdale any time in the car?

Mr. Toole: Same objection.

The Court: Overruled.

A. Not to my recollection.

Q. Now, Mr. Garrity, during this same period of time in which Coverdale and Johnson were operating and handling the work of their highway contract, concerning which you have testified, did you ever see other persons transported in the automobile of either Mr. Coverdale or Mr. Johnson?

Mr. Toole: That is objected to upon the ground and for the reason that it is immaterial as to whether or not Mr. Coverdale in his automobile ever transported any other person, because it is not shown as to who the other persons may have been, it is not shown as to whether or not they were employees of the partnership or men engaged in work on the job; that it is immaterial because the hauling of other persons would not serve in any manner to demonstrate the authority of Johnson or Bardon to pick up the two Doheny girls, that is, as to Coverdale.

(Deposition of Clair Garrity.)

The Court: Sustain that as to Mr. Coverdale.

Mr. Toole: Now, it is objected to as to Mr. Johnson because it is immaterial, does not tend to prove any issue in this case, because the hauling of other persons by Mr. Johnson does not tend to prove that he had authority or right or permission from the partnership or from Mr. Coverdale to haul the Doheny girls in his car. It is [109] further objected to because the persons indicated in the question are not named; it is not shown whether they were employees of the partnership or of Johnson, and the time is not named, remote, and does not tend to show or indicate any grant of authority by the partnership or by Coverdale to Johnson or to Bardon to pick up the two Doheny girls.

The Court: The question is subject to answer Yes or No, and again it shows as to whether Johnson was acting under accident or mistake; it is therefore overruled until it is.

Mr. McCabe: The next answer, he doesn't say Yes; it reads:

A. I used to see passengers in their cars right along; they transported help back and forth to the project many times.

Mr. Toole: I move that the answer be stricken, and counsel be asked to refrain from reading——

(Deposition of Clair Garrity.)

The Court: Yes, that will be passed. Gentlemen of the Jury, you will disregard having heard that answer. The objection will be sustained to that.

Mr. McCabe: These are all the same line and we will just skip them.

The Court: Very well.

Witness: Johnson's car was a Ford V-8. On the evening of December 10, 1934, shortly before 8 o'clock in the evening, I saw Mr. Johnson, Marguerite Doheny, Roberta Doheny and George Bardon in the Johnson automobile; they were inside of the car at the time. The car was standing still when I seen it last; I went upstairs in the hotel and Mr. Johnson was sitting behind the wheel the last I seen of it; he was sitting in the driver's seat. There were [110] two other men but I don't know their names; they were in Augusta a short time, having been laid off that night.

Q. At that time did Mr. Johnson say anything to you about going to Great Falls?

Mr. Toole: Objected to as calling for hearsay, the defendant Johnson never having been served in this action and not being a party to the action, and any statements made by him would not be binding upon the partnership in so far as they bear upon the matter of picking up the two Doheny girls to give them a ride to Great Falls.

(Deposition of Clair Garrity.)

The Court: That question may come up later, one party who is responsible for the other, and it will be overruled.

A. Mr. Johnson asked me if I was ready to go, that he was leaving for Great Falls and that they were ready to go at that particular time.

Witness: This conversation I had, the last conversation I had with Mr. Johnson, was in the lobby of the hotel; the others were in the car ready to leave. When Mr. Johnson was at the wheel of the car, that was after he talked to me; he went out and got into the car immediately after; I saw him get into the car. I did not see him drive away. The automobile in which I saw Mr. Johnson seated in behind the driver's wheel that evening that I had this conversation with him was a Ford Sedan, V-8 automobile. It was the car that Mr. Johnson claimed as his car.

Cross Examination

By Mr. Boone:

Witness: I was not employed by either Mr. Coverdale or Mr. Johnson nor by the partnership of Coverdale and Johnson. I [111] worked on the Tomlinson-Arkwright road project. The conversation which I had with Mr. Johnson on the day prior to the accident started at the dinner table, I would say approximately 6:30 or 7 o'clock, between 6 and 7. He didn't say when he had arranged the trip for Great Falls but he told me he was intending to leave immediately after dinner and that if I cared to go with him I could; however, I didn't go with

(Deposition of Clair Garrity.)

him, because I decided that the car was overloaded as it was, without me; there were already six people in the car.

I have related that on numerous occasions I have ridden with Mr. Johnson, and the car in which I had ridden with him was, to the best of my knowledge, owned by him; as far as I know, it was owned by Mr. Johnson. It was the same V-8 Ford involved in this case. I couldn't say the dates of those occasions when I rode with him. They had small bridge structures right along this project I was working on and at different times in going out to them Mr. Johnson would let me ride as far as I was going, where I was working. The occasions when I rode with Mr. Johnson were when he was taking me to my work. I was not employed by Coverdale and Johnson, nor by Mr. Johnson nor by Mr. Coverdale, and the work which I was performing wasn't being done by Coverdale and Johnson. Neither Mr. Coverdale nor Mr. Johnson had anything to do with the work that I was performing. I was employed building concrete culverts and cattle passes and in some parts of the work being performed by Coverdale and Johnson they were working within, I would say, 100 yards of where I was working; some days they were working altogether on the other end of the project.

Mr. Coverdale and Mr. Johnson stayed at the same hotel where I resided, and on the occasions when I rode with Mr. Johnson [112] he invited me to do so, simply to take me to work, and the rides

(Deposition of Clair Garrity.)

were in the car owned individually by Mr. Johnson, as far as I know.

Mr. Johnson and Mr. Coverdale on numerous occasions transported their own men from the hotel to the work; it is a considerable distance from the hotel to the bridge projects. Those were the men actually working for Coverdale and Johnson. I also stated I seen, numerous times, had seen men in their cars that weren't employed by them; those men were employees of the Tomlinson-Arkwright Company, and were men in the same position I was exactly.

Mr. Toole: I move that the entire testimony of Mr. Clair Garrity be stricken from the record upon the ground and for the reason that it does not tend to show in any respect any condition from which any inference may be drawn that it was the custom of either the partnership or Mr. Coverdale to haul guests; the evidence discloses that all persons referred to in Mr. Garrity's evidence were employees of Coverdale and Johnson or employees of Tomlinson and Arkwright; further shows that the Tomlinson and Arkwright contract, their work, was concurrent with the same place as Coverdale and Johnson, and the hauling of employees back and forth from the job does not tend to prove either as to Coverdale and Johnson or as to Coverdale that any permission or right or authority was given to haul the two Doheny girls

(Deposition of Clair Garrity.)

as guests on the night of December 10, and it does not tend to prove that when Mr. Bardon and Mr. Johnson picked up the two Doheny girls that they were engaged in the scope of the business of the partnership. [113]

The Court: The motion will be denied. You don't offer to show in the examination of Garrity if Tomlinson & Arkwright and Johnson & Coverdale were connected in any manner, doesn't show, and therefore, as far as they are concerned, they are in the same position as Garrity. Motion will be denied.

Mr. McCabe: Mr. Blakeslee was subpoenaed as a witness. He is engaged in certain highway work and, with the consent of Mr. Toole, Mr. Toole has agreed that it may be shown in the record that on the night of December 10, 1934, after the hoist was delivered in Great Falls, Montana, at the Blakeslee yard, Mr. Johnson called Mr. Blakeslee on the phone.

Mr. Toole: No, that is not quite, it is almost, right.

Mr. McCabe: I see that there is a stipulation that is prepared. We will read this into the record.

Mr. Toole: The record should show, your Honor, that we are willing to stipulate that if Mr. Blakeslee were here that that is what he would testify to,

but we make the same objection to the materiality of the evidence that we have to all the other evidence in this case.

The Court: I can't hear it until it is read, you know.

Mr. McCabe: Your Honor, please, the stipulation should go farther to the fact that Mr. Blakeslee was present in court and so testified, subject to objection.

The Court: That is what Mr. Toole now said.

STIPULATION

It is hereby stipulated and agreed, by and between the above named plaintiff and the defendant John M. Coverdale and the defendants Coverdale and Johnson, a co-partnership, acting [114] by and through their respective counsel, that if E. H. Blakeslee of Great Falls, Montana, were called as a witness on behalf of the plaintiff in the above entitled action that his testimony would be as follows:

That on or about the 20th day of October, 1934, the said E. H. Blakeslee rented to the defendant Coverdale & Johnson certain equipment consisting of an Ersted two-drum hoist with tractor power to be used by the defendant Coverdale & Johnson in connection with the performance of the construction and improvement work on Augusta-Sun River road.

That pursuant to said agreement the defendant Coverdale & Johnson took possession of said hoist

on or about the 20th day of October, 1934, and used the same for approximately fifty-two days in connection with said construction and improvement work.

That on the 10th day of December, 1934, at about twelve o'clock midnight the said E. O. Johnson called the said Blakeslee at the Blakeslee home in Great Falls. That the said Blakeslee at said time was in bed and said Johnson told the said Blakeslee that he was returning the hoist and equipment that evening and wanted to know where to put the same. It was a cold night and said Blakeslee told said defendant Johnson that he would not go down to his warehouse and said Blakeslee further told said Johnson to make delivery of said hoist to the Blakeslee loading platform at the Blakeslee warehouse. That the said Blakeslee warehouse is in Great Falls.

That the said Johnson had not called the said Blakeslee concerning said hoist and equipment on the said 10th day of December, 1934, prior to the conversation above related, nor had the said Coverdale & Johnson nor either of them, nor any of their servants or employees notified said Blakeslee prior to the above [115] conversation that said hoist and equipment was to be delivered on the said evening of December 10th, 1934.

That the said Blakeslee did not assist in the unloading of said hoist nor did any of his employees, servants or agents, and that said Blakeslee did not see Johnson or any persons with him on the night

of December 10th, 1934. That on the morning of December 11th, 1934, the said Blakeslee found said hoist and equipment on the platform at the said Blakeslee warehouse.

Mr. McCabe: Now, I think the stipulation should go farther and say that Blakeslee was subpoenaed as a witness, and that this evidence is admitted with the same effect as if he had so testified personally in court, subject to any objection you may have.

Mr. Toole: Well, that is all right; you may let the record show that. And then let the record show that the defendants object to all of the evidence offered in the stipulation, upon the ground and for the reason that it is immaterial and does not tend to prove any of the issues in this case, it being immaterial so far as the Doheny girls are concerned, or their successors in interest, or the plaintiff in this case, as to what Johnson was doing on the night of December 10th with respect to the hoist, and that any act of Johnson, in so far as the Doheny girls are concerned, would not be binding upon the partnership or upon Mr. Coverdale.

The Court: Overrule the objection.

FRED M. CHAMBERLAIN,

sworn as a witness for and on behalf of the plaintiff, in answer to questions put to him testified as follows:

Direct Examination

By Mr. McCabe:

Witness: My name is F. M. Chamberlain. I reside at Augusta. [116] During the month of December, 1934, I was employed by the firm of Coverdale and Johnson. At that time I was acquainted with E. O. Johnson and was acquainted with Mr. J. M. Coverdale. During that period of time up to the 10th day of December, 1934, Mr. Coverdale was present most of the time with Mr. Johnson on the work that they were performing on the highway known as the Augusta-Great Falls Public Highway. I couldn't say as to any certain length of time that Mr. Coverdale had been present on that work; he had been there off and on, had been there most of the time until that time, until the job was finished. While I was employed by Coverdale and Johnson I observed a Ford Sedan V-8 automobile driven by Mr. E. O. Johnson, but I couldn't say whether it was used in connection with the transportation of any employee from Augusta to the work. As to my duties in connection with the work in December, 1934, I done some painting for them, done a little carpenter work, and I kept that bridge hot. I worked on this bridge for Coverdale and Johnson. I was present on the project work at different times.

Q. During that time did you ever see or observe

(Testimony of Fred M. Chamberlain.)

or know of the automobile owned by Mr. Johnson being used in connection with the work that was being performed by the partnership?

Mr. Toole: That is objected to as immaterial and not tending to prove any issue in this case, it being immaterial as to whether or not the car was used at any particular time on the job, that it does not tend to prove the general use of the car as indicated in the pleadings in this case.

The Court: That will have to be connected, of course, but it was a circumstance, now it is proper to go to the jury. Objection will be overruled. [117]

A. No, I can't say that I did.

Mr. McCabe: You may cross examine.

Mr. Toole: No cross examination.

(Witness excused.)

DR. LAWRENCE L. HOWARD,

sworn as a witness on behalf of the plaintiff, in answer to questions put to him, testified as follows:

Direct Examination

By Mr. McCabe:

Witness: My name is Lawrence L. Howard; I live at Great Falls, Montana, at the Racine Apartments. I am a surgeon, a graduate of a medical college, and have been admitted to practice my pro-

(Testimony of Dr. Lawrence L. Howard.)

fession in the State of Montana, and licensed to practice. I have been practicing two years in Montana. Prior to Montana I had had experience in surgical hospitalization work or interneship work for six years.

On the morning of December 11, 1934, I received a call to render medical services to some persons, and pursuant to that call I went to Simms, Montana, with an ambulance to pick up some injured parties. When I arrived at Simms I observed persons there requiring medical attention or surgical attention; I was told their names were Mr. Johnson and two Doheny girls—Marguerite and Roberta. I observed the condition of the two Doheny girls at that time. They were in a nearby house about 100 yards from where the accident had occurred. I observed the injuries they had sustained and am able to state now what they consisted of. Take, for instance, Roberta, her injuries were rather numerous. At the time Roberta was seen she was unconscious, in very poor condition and marked shock. Her extremities were cold. She was breathing in a stertorious manner, and bleeding from the mouth [118] and right ear and from a scalp wound. She was coughing up a considerable amount of blood. She had a deep laceration of the scalp on the right side back of the forehead; this laceration extended down to the underlying bone. Her right mandible, that is the jawbone, was broken; she had marked swelling of the right eye and a large bruise over the right

(Testimony of Dr. Lawrence L. Howard.)

side of the face; there was a puncture wound on the upper lip from one of the teeth; she had a large bruise over the sternum, that is the breast bone. Her evidence, from the physical examination, was that she was in considerable degree of heart failure, and there was a large amount of fluid in the lungs. There were lacerations and abrasions of both knees.

Q. Doctor, these lacerations and injuries which you have detailed here, are they such as ordinarily produce physical pain?

A. May I ask a question before I answer that?

Q. Yes, you may ask.

A. May I ask if the patent is unconscious, whether they have pain or not?

Mr. Toole: No, object to that.

Q. Just answer the question: Were these injuries which you have recited, were they such as at the time were capable of producing suffering, physical suffering and pain?

A. I am sorry I can't answer that question Yes, sir.

Q. Was the laceration on the head of such a type as capable of producing pain and suffering?

Mr. Toole: That is objected to. The Doctor has stated that at the time he found Roberta her condition was such that he doesn't know whether she was suffering pain or not. The record does not disclose that she had simply an injury on the head. I am perfectly [119] frank with the Court and jury, and I think

(Testimony of Dr. Lawrence L. Howard.)

Roberta was unconscious immediately after the accident and that she could not suffer pain.

The Court: That is the point right there, Mr. Toole; he should ask whether the injuries were such as to render her immediately unconscious, and he can answer on that question as to whether or no those injuries would cause pain and suffering.

Mr. Toole: Counsel, of course, frames his own question. I was objecting to the question with respect to the injury on the head alone.

The Court: Well, of course, I don't know which was caused first. The lacerations, as I recall, he said that there was a cut down through the jawbone. The lacerations were on the extremities, were they not? You better develop, Mr. McCabe, whether at the time that had elapsed between the time the doctor arrived and any wound that he noticed or laceration, that would have the immediate effect of rendering her unconscious. I think that would be better to show.

Witness: Upon my arrival to observe the condition of these two girls, Roberta was unconscious at that time. She died, I can't tell you the exact minute, but approximately 10:35 a. m. on 12/11/34. I arrived at the scene where I was called upon to go at approximately 6:30 a. m. She lived approxi-

(Testimony of Dr. Lawrence L. Howard.)

mately four hours from the time I arrived there. I was not in constant attendance upon her during the entire period from the time I first saw her up to the time of her death. At the time that I was in attendance upon her she was unconscious. The times I was not there I can't say whether she was conscious or not, only [120] in so far as reading the record of the nurse who was in attendance. It would have been possible during that time for Roberta to have become conscious at any time.

Q. And in the event that during that period she should become conscious, were these injuries, such as you have related, sufficient to produce physical pain and suffering?

Mr. Toole: I object to the question on the ground and for the reason that it is vague and uncertain, suggestive and leading, is not based upon any fact in the record, that there is no evidence in the record from which the doctor can state an expert opinion, and therefore calls upon him for a conclusion which he is not qualified to give.

The Court: Overrule the objection.

A. Yes, sir.

Witness: These injuries that I have related were of such a character as to produce the death or cause the death of Roberta Doheny, and from my observation of the injuries and the death of Roberta Doheny I believe that those injuries were the

(Testimony of Dr. Lawrence L. Howard.)

cause of Roberta Doheny's death. There was considerable loss of blood by the girls.

With reference to Marguerite Doheny I observed her and gave attention to her at that time. I was given to understand the girl I saw was Marguerite Doheny. At the time she was seen she was unconscious, breathing fairly easily, in moderate degree of shock. She had considerable loss of blood from a scalp wound extending from ear to ear along toward the forehead, with the scalp turned back. She was also bleeding from the right ear and from the mouth. She had a fracture of the right femur in the middle third. There were bruises and contusions of the left [121] upper extremity. The femur is the thigh bone, and the fracture was approximately half way between the hip and the knee. At the time I observed Marguerite Doheny she was unconscious.

Q. And these injuries which you have related here, in the event that Marguerite Doheny should have regained consciousness, were they of such a character as would inflict or cause physical pain and suffering?

Mr. Toole: Objected to as calling for a conclusion of the witness, not based upon any facts in evidence, speculative and uncertain, and no proper foundation laid.

The Court: He may answer.

A. May I answer that and say from my experience and from observation of other patients who

(Testimony of Dr. Lawrence L. Howard.)
have had injuries perhaps similar, one would expect them to produce pain and suffering.

Mr. Toole: May I have the answer stricken, because it is not responsive?

The Court: Overruled.

Witness: The approximate time of Marguerite's death was 8:45 p. m. on the same day. From my observation of the injuries from which Marguerite Doheny was suffering at the time, it is my opinion that the injuries were responsible for her death.

For my services in connection with attendance upon these two young ladies prior to their death, the charge I made was $25.00 on each one, $50.00 altogether, which was a very reasonable charge for the services rendered.

Cross Examination

By Mr. Toole.

Witness: As far as I know, I don't believe either one of these girls ever regained consciousness after I saw them.

(Witness excused.) [122]

EVA MAY ALLARD,

sworn as a witness on behalf of the plaintiff, in answer to questions put to her testified as follows:

Direct Examination

By Mr. McCabe.

Witness: My name is Eva May Allard. I reside in Great Falls. In the month of December, 1934, I resided in Simms, Montana. I am a registered nurse, registered under the laws of the State of Montana.

On the morning of December 11, 1934, I was called to render professional services in the town of Simms. It was about five o'clock in the morning. Pursuant to that call I went on the highway to in front of the James home and Dawson home, the public highway known as the Great Falls-Augusta road. I saw there a girl by the side of the road, and I saw an automobile in front of a tree close to the highway. The front part of the automobile was right up against the tree. I saw there Roberta Doheny lying alongside of the road. I was met by Mr. James and Mr. Dawson and they took me over to the driver; I think his name was Bardon, or something like that; and in the back seat of this car, inside the car, I saw Marguerite Doheny and Mr. Johnson, whose initials I don't know. With respect to Roberta Doheny, it being dark, I did not at that time observe any injuries, or cuts or lacerations on her person; they carried her in the home before I looked to see what was wrong.

(Testimony of Eva May Allard.)

I rendered first aid to the two girls, Marguerite and Roberta Doheny. In rendering first aid the girls were moved on cots from the place where I first saw them. When these girls were moved one of them gave manifestation or sign of pain; I only moved one, helped move one, and that was Roberta; I stayed with her; when we moved her I heard a slight groan. I did not help to remove Marguerite. I saw these girls in Mr. James' home that morning; it was then that I examined them. They [123] seemed unconscious and in shock, and they were covered with blood, and Marguerite had a laceration across her forehead. I did not examine her for fractures; I thought the doctor could do that. I was present when the doctor examined them. With reference to Roberta, he said she had a broken jaw, and with reference to Marguerite I noticed a broken femur, which is the upper bone of the leg. I don't remember whether I observed any bruises on the girls' bodies.

Mr. McCabe: You may cross examine.

Mr. Toole: No cross examination.

(Witness excused.)

ROBERT DAWSON,

Sworn as a witness on behalf of the plaintiff, in answer to questions put to him testified as follows:

Direct Examination

By Mr. McCabe.

Witness: My name is Robert E. Dawson. I reside at Simms, Montana, and was residing there in December, 1934. On the morning of December 11, 1934, I was present at a point on the public highway as it passes through Simms, Great Falls-Augusta highway, where there had been an automobile collision. I looked at the watch at the time I heard the crash, and it was twenty minutes to five. We were sleeping in an upstairs bedroom, and when I heard the crash I got up and picked up a flash-light and went to the window in the front of the house and flashed the light down in front of the house, and it looked like there was something down there, something dark, and I heard some murmur. I say I heard some sort of murmuring, and I just rushed back then and slipped on some clothes, my wife followed me, and went out to the car, and I found the car piled up right against this tree; the front [124] part of the car, the bumper, was against the tree. The time that elapsed from the time of the crash to the time I went out to where the car was, was about as long as it would take a fellow to get downstairs, a minute or two, two or three minutes probably. When I got out there the only persons I observed at that time

(Testimony of Robert Dawson.)
was the driver—I didn't know his name at that time—Mr. Bardon, and Mr. Johnson in the back seat. At that time I had a conversation with Mr. Bardon; I am not just exactly sure what I said at that time, but I asked him how he felt, and all he told me was, "Please get me out of here, get me out of here." I do not remember asking the question at that time how this happened.

You discussed this case with me last week in Simms, and as to whether you asked me whether I had asked Mr. Bardon at that time how this happened, I am not just sure what you did ask, if I did answer that I asked Mr. Bardon that question; I am not sure that I did. My recollection now is that I did not.

When I saw Mr. Bardon there at that time, the under part of the wheel was crushed, broken off, the front seat was shoved ahead, I couldn't say how far, but it was shoved right up so he was right against the wheel, and the wheel was pressing, he was just as far ahead as he could get, and the front seat was jammed up against him. At that time I did not notice any other persons in the car besides the man in the back seat; afterwards I did; the first inkling I had that there might be anyone else there, Mr. Johnson said "Never mind about me," he says, "there's a couple of girls here," he says "get them out." So I went around to the other side of the car, rather, my wife did, and found one girl hanging out of the car, her

(Testimony of Robert Dawson.)

feet were caught in the car and she was hanging with her head down almost to the ground, past the running board. Her feet were inside the car, the seat was [125] shoved ahead and her feet were caught under the hood, the cowl. I noticed another young lady in the car at that time, I guess it was Marguerite, in the back seat, and she was slumped ahead, lying right across the bottom of the car, in the back seat, face down, in a position back of the front seat, just on the floor of the car. At that time I remember asking Mr. Johnson, the man in the back seat, the question how this happened; he said he did not know. There was blood upon the girls at that time; the girl in the front seat was bleeding, was bleeding from the mouth and from a wound on the forehead when I got there, and of course, it was quite a while, I went to get Mr. James before we could move any one, and after that we noticed of course that there was blood on Marguerite.

We had just moved in some furniture in our house and we were going to paper the next day, and we had to move the girls to Mr. James' house, and he got some cots. First, I might say, my wife, I am not sure just who, but we moved the girl in the front seat out, we loosened her legs, and I just took her out of the car and laid her down on the ground, and we got a couple of blankets and covered her, and then Mr. James was there by that time—I had gone to call him—and he brought some

(Testimony of Robert Dawson.)

cots, and then we put the girls on the cots and took them to Mr. James' house. Thereafter I examined the road, this highway, for the distance as it went through Simms there and in proximity to the point where the automobile was in contact with the tree. I observed the automobile at that time. The width of the road at that point I know exactly, because just yesterday Joe Ugrin was out there and he measured the road, and it was about thirty feet; I was there when he measured it. The road then might have been a little bit wider than it was at the time of the collision, but it wouldn't be any [126] appreciable amount, approximately a couple of inches wider now than then. I observed the condition of the gravel on that road; it was evenly distributed over the road; there were no collections of gravel along there at the time. The road there is straight for a mile west and three miles east. The tree, to which reference has been made, from the shoulder of the road I judge it would be about eight feet, eight or nine feet; somewhere in there, on the south side of the road. From my house, the tree is four feet from the fence; I imagine it is about 15 to 20 feet to the house.

At that time I observed the automobile that was in collision there with the tree. Plaintiff's proposed Exhibits Nos. 1, 2, 3, 4, 5, 6 and 7, I identify as pictures of that automobile, and fairly and accurately represent and portray substantially the condition of the automobile at that time.

(Testimony of Robert Dawson.)

Mr. Toole: We have no objection.

Mr. McCabe: Proposed Exhibits for Plaintiff numbers 1 to 7 inclusive may be admitted in evidence without objection. Plaintiff's exhibits 1 to 7 both inclusive are photographs of various parts respectively of the Ford automobile involved herein reference to which exhibits and each thereof is hereby made.

Witness: I was acquainted with the condition of the highway on that day of December 11, 1934. There was no snow or ice on the highway at that time and it was dry. Plaintiff's proposed Exhibit No. 8 I identify as being a picture of that highway, and the tree appearing on the exhibit, indicated by the word "Tree" and the cross mark, is the tree to which I have referred. It is a view of the highway looking east. The condition of the highway as it appears in this picture is in the same condition as it was on the morning when I examined it at the time of the collision. The picture shows two persons standing there with a part of one automobile and parts of two other automobiles, but they were not [127] there that morning; with that exception the picture substantially represents the condition as it was that morning.

Plaintiff's proposed Exhibit No. 9 I am able to identify as a picture of that highway looking west, and shows the tree, or portrays the tree, to which I have referred, indicated by the word "Tree" and a cross mark. The automobiles and persons appear-

(Testimony of Robert Dawson.)

ing therein were not there on the morning of December 11th; of course, Joe Ugrin's car was there, but at the time of the accident there were no cars. When I went to examine the automobile that was in contact with the tree, I then looked on the highway to see if there were any other cars there in close proximity to this car, and there were none. Proposed Exhibit No. 9 substantially shows the condition of the highway looking west from the point where it appears to be taken as the highway goes through the town of Simms, shows the condition the gravel of the road was at the time when I examined it that morning.

Plaintiff's proposed Exhibit No. 10, with the tree indicated thereon by a cross, is the tree and the point in the highway concerning which I have testified as to where the automobile was in contact with the tree, except that the two automobiles shown thereon were not there at the time of the accident. It substantially represents or portrays the condition that the road or highway was in at that time.

On Plaintiff's proposed Exhibit No. 11 I am able to identify the tree that is shown there, and at your request I mark by the letter "D" (for Dawson) where my house is. The picture substantially represents and portrays the condition that the tree was in after the automobile was taken away on that morning.

(Exhibits handed to opposing counsel.)

Witness (In response to Mr. Toole): When I stated that the [128] pictures—Exhibits 8, 9, 10

(Testimony of Robert Dawson.)

and 11—substantially represent the condition of the highway at Simms on that morning, I did not mean that they represent the surface of the highway or the condition it was in that morning as to tracks or anything of that kind; what I meant by that is that there weren't any ridges or anything like that; I testified as to the smoothness of the road, the width of the highway and general smoothness of it, and the tree and my house. As to the surface condition of the highway with respect to tracks, of course many cars had passed over that highway between the date of the accident and the date when the picture was taken. I believe any tracks that appeared there on the morning of December 11th would be obliterated at the time the pictures were taken.

Mr. Toole: Then we have no objection to the admission of the exhibits, with the understanding that they do not portray the condition of the surface of the highway on the date of the accident.

Mr. McCabe: I now offer in evidence Plaintiff's Exhibits Nos. 8, 9, 10 and 11. Plaintiff's exhibits numbered 8, 9, 10 and 11 are photographs of portions of the highway at and adjoining the place where the Ford automobile collided with the tree standing at the side of the highway, reference to which exhibits and each thereof is hereby expressly made.

(Testimony of Robert Dawson.)

The Court: You say they do not portray the surface of the highway. He says that they do with the exception of ridges, and if there were any tracks there they might be obliterated.

Mr. Toole: Yes, that is what I mean.

Witness: (In response to Mr. McCabe): After this collision and we had removed the young ladies to the James home, as soon as it was light we examined the road for any tracks leading from this automobile out on to the road, and observed tracks extending from the wheels of the automobile out on to the surface of the highway, which extended in a sort of gradual curve across the highway to [129] the edge of the road, and then there were tracks running along a foot in from the shoulder of the road for quite a distance east. These tracks that turned, it was a gradual turn over to the left-hand side of the road. I will indicate by a diagram on this paper just how much of a turn or degree of turn those car tracks took; I will make the tree here; I judge that is about how it was; I will make the two tracks as they ran from the automobile; this was on the left side of the tree. I believe that is just about—might have been a little more gradual in here. I now extend the lines of those wheels (tracks?) where I followed it down to the right-hand side of the road, and will indicate by the words "Automobile Tracks." I am sure of and never measured the distance from the

(Testimony of Robert Dawson.)

tree where the car tracks first turned to the left, and I never heard of any measurement, the road is 30 feet wide there, and I imagine it would be back 40 or 50 feet, judging from the angle of that curve and my recollection of what I saw at that time. The car traveled approximately 50 feet, a little better I believe, after it started to turn before it came in contact with the tree, fifty or sixty feet.

Q. Will you please indicate the directions on that and just about where the sides of the road extended, the shoulders of the road, extend it clear beyond, just write the words on here "Shoulder of road," and also here "Shoulder of road." Now, will you please indicate the directions on there by the word "West," the road going west, and the "East" and "North" and "South." Now I understand from your testimony that the car tracks came from the east and going in a westerly direction to the point where the automobile stopped?

A. Yes.

Q. And after it started to turn, the car tracks, I take it, took a southwesterly direction up to the point of contact with the [130] tree. A. Yes.

Mr. McCabe: We now offer in evidence Plaintiff's Exhibit 12.

Mr. Toole: No objection.

The Court: Admitted without objection.

(Plaintiff's exhibit 12 is a diagram made by witness Robert Dawson illustrating his testimony as to

(Testimony of Robert Dawson.)

the course and direction of the automobile tracks appearing on the highway at the time he examined said highway, reference to which exhibit 12 is hereby made.)

Witness: Those were the only car tracks which turned and went between these points and up to where the automobile stopped. Other car tracks on the road did not turn, they extended east and west.

Cross Examination

By Mr. Toole.

Witness: When I looked at the tracks they showed that the car had been proceeding in a westerly direction on the right side of the road, and then when the car reached a point some 50 or 60 feet from the tree it made a turn to the left, and across the road in a turn and right to the tree. I went out and examined the tracks that morning after daylight came. These tracks were just as wide as an ordinary car track, that is one thing that we noticed, that the car did not skid a trifle, according to all the people that were there; the tracks just looked like the same on the side of the road as they did at any point on the curve. The angle that the car turned, from the diagram there I imagine it would be around a 45 degree angle, if you mark the point; it wouldn't be quite a 45, it would be a broader angle than that. There was no evidence of skidding in the tracks at all, and no evidence of any gravel being thrown up out of the tracks,

(Testimony of Robert Dawson.)

and the tracks were just about the width of a tire. Upon the road it was rather evenly loose surface gravel, so that the tracks were quite distinct, we could see them.

Q. And from an examination of those tracks, could you indicate at about what speed the car was traveling?

Mr. McCabe: To which we object as improper cross [131] examination, no proper foundation has been laid.

The Court: That is a new one, on the tracks showing the speed. The speed was not gone into, not proper cross-examination; sustained.

Mr. Toole: I would like to make an offer of proof.

The Court: Not on cross examination. I held —I don't recall the decision—some years ago, offers of proof were not proper on cross examination, and the Supreme Court sustained. You have a right to ask any questions and the Court will pass on them, but offers of proof on cross examination are not proper.

Mr. Toole: Do I understand the Court does not permit the offer of proof?

The Court: Yes, you can direct any question you want to, to this witness.

Witness: It was about twenty minutes to five in the morning that I went out there, and I imagine it was around 6:30 or 7 o'clock, I think, or later, when I went out to look at the tracks. When

(Testimony of Robert Dawson.)

I looked at the tracks I found that the condition of the tracks where the car was turning in making the curve was the same as the condition of the tracks when it was traveling straight on the highway; that there was no evidence of skidding, and we didn't notice any gravel thrown up out of the track.

Q. Now, based upon what you saw there, will you tell me as to whether or not there was any physical condition there indicating high speed?

Mr. McCabe: To which we object on the ground it calls for a conclusion of the witness, improper cross examination, no proper foundation has been laid for the question.

The Court: Sustain the objection.

(Witness excused.) [132]

HERSCHEL JAMES,

sworn as a witness on behalf of the plaintiff, in answer to questions put to him testified as follows:

Direct Examination

By Mr. McCabe.

Witness: My name is Herschel James. I reside at Simms, and was residing there on December 11, 1934. On December 11, 1934, I was called from my home around between 4:30 and 5 o'clock in the morning, and proceeded to this automobile

(Testimony of Herschel James.)

wreck in front of Robert Dawson's home, where a Ford automobile was crashed against a tree in front of the Dawson house, just off of the public highway known as the Augusta-Great Falls highway. There I saw Roberta Doheny lying in the ditch outside of the car; I saw Bardon, I believe is his name, in the front seat, and I saw Johnson in the back seat, and I saw Marguerite Doheny in the back seat. The right-hand side of the car, the side toward Roberta Doheny, the door was open. She had been taken out of there when I got there, she was lying down on the ground. Mr. Bardon was still in the automobile; I lifted him up, lifted his body out of the car. The front seat of the automobile had been pushed forward considerably, and the back of the front seat as it was pushed forward rested against Mr. Bardon's back; he was just up against the steering wheel and his head kind of slumped over it slightly; the bottom part of the steering wheel was broken. They took Marguerite out of the car, laid her on the ground, and in just a very short time put her on a cot and took her over to my house. After that I noticed the condition of the highway at that time. There was no snow or ice on the highway, and it was perfectly dry.

Exhibits, marked for identification numbers 1 to 7 inclusive, fairly represent or portray the conditions substantially the car was in at that time. On Exhibit 6, the seat looks to me that it [133] isn't

(Testimony of Herschel James.)

in its natural position, it should be across the other way. In taking Mr. Bardon out I don't recall that I moved the seat at all; I know I took hold of his body under the arms, and Robert Dawson got on the other side to get his legs free, but I don't recall moving the seat back. With the exception of the front seat being changed around, that exhibit is substantially a representation of the inside of the car at that point at that time.

I am acquainted with the highway that extends through Simms, Montana, known as the Great Falls-Augusta highway. Exhibits 8, 9 and 10 fairly represent substantially the condition the highway was in at the time I examined it on that morning, with reference to the surface and the gravel, and the points indicated on these pictures by the word "Tree" and the mark "X" represent the tree against which the automobile was crashed at the time. I examined the gravel on the highway at that time after the accident; there were no ridges in it whatever; it was smooth or even.

I have had experience in driving automobiles, and driving automobiles on that particular road and other graveled roads, and from my observation of the road at that time it was in perfect driving condition for a gravel road. The road at that time I judge was about thirty feet wide. Plaintiff's Exhibit No. 11 is a fair representation of the condition of the tree that has been testified to in this case, after the automobile was removed.

(Testimony of Herschel James.)

After that, on this same morning, I examined the highway for automobile car tracks leading from this automobile up on to the highway. The point where the automobile was at the time it was in contact and crashed into the tree was off the highway; my recollection is that it was all off the highway. The car tracks showed that the car apparently was going straight west, swerved [134] slightly to the right, right near that little ditch, and then took a turn at approximately a 45-degree angle right across the road to the tree. On Exhibit 12, the marks indicated on there by the words "Automobile Tracks" show approximately the angle at which the car turned, but first, before the car turned that way, it turned to the right slightly, and the track was very distinct right next to this little ditch to the side of the road, a ditch probably six inches deep.

Q. Mr. James, will you please indicate by lines on a sheet of paper the shoulder of the road, or the approximate shoulders of the road as it extends east and west. (Complies). Please indicate the directions east, west, north and south, writing them out. (Complies.) Please indicate on there the tree which is shown in the exhibits, concerning which you have testified, and then indicate on the map the direction or the course of the automobile tracks, as you remember them at that time. (Complies.) Now, which is the shoulder?

A. This indicates the shoulder of the road, and this is the little ditch to the side of the road, and

(Testimony of Herschel James.)

right here is the canal; he apparently was going along this direction, and the car swerved at such an angle as that. The tracks indicate he was going straight, and then he came out like that for a few feet, probably 15 or 20 feet, something like that, and then he turned something like that right straight for the tree. The turn that he took would not be quite as abrupt as that; I know I estimated at the time that he made approximately an angle of 45 degrees.

Q. Will you just draw those lines so that they are more accurate, even if you have to come back farther on the paper. (Complies.)

A. I think that is it.

Witness: That dotted line I have drawn represents the edge [135] of that little ditch by the side of the road. The point between the solid line close to the word "North" on that side of the diagram is approximately the end of the gravel.

Q. And then between the ditch edge and the end of the gravel, . . . You better put the word "Gravel" on there to indicate it, and this, the "Edge of the ditch," put that. So, I take it that the two lines indicated by the words "Edge of Ditch" and "Gravel," that the space in between indicates the shoulder part of the road off the gravel?

A. Yes; of course, there naturally gets some gravel in there, a little gravel in there, but it is more on the shoulder of the road.

(Testimony of Herschel James.)

Q. That diagram, if you make two lines to indicate the automobile tracks, and write "Automobile tracks." (Complies.)

Mr. McCabe: I now offer in evidence plaintiff's exhibit No. 13.

Mr. Toole: No objection.

The Court: Admitted without objection.

Plaintiff's exhibit numbered 13 is a diagram illustrating the testimony of Herschel James with reference to the condition of the highway at the time he examined said highway, reference to which exhibit numbered 13 is hereby made.

Witness: On the two young ladies, when I arrived at the scene, there were indications of bleeding from the two girls; there was a considerable amount of blood on both of them, particularly Marguerite. At that time I recognized the make of the automobile as being a Ford Sedan.

Cross Examination

By Mr. Toole.

Witness: When I went out to look at the tracks I found that the car had been going west on the traveled portion of the road, and before it got abreast of the tree it made a slight turn to the right toward the shoulder of the road, and then made about a 45-degree turn across the road and struck the tree. I would say the car was back east of the tree probably 20 to 30 feet, 25 feet, [136] something along there. The tracks were perfectly clear; there

(Testimony of Herschel James.)

was just enough loose gravel there to make a very clear imprint. They did not indicate any skidding, nor was any gravel thrown out of the tracks that I could see; in other words, the tracks where I saw them crossing the road and where they made the turn were physically about the same as the tracks made while it was traveling along on the straight road. The tires, as I remember them, seemed like they were practically new tires; they were all up, there were none of them flat; and the treads were in good shape.

Q. Mr. James, would you be able, from what you saw of the tracks, the condition in which you saw them, to give an opinion, your best judgment, as to the speed of the car?

Mr. McCabe: To which we object on the ground it is not proper cross examination, no proper foundation has been laid for its admission; the witness has not shown himself qualified to testify.

The Court: No, he said that from his experience the road was in perfect condition—different testimony from the prior witness—that from his experience the road was in perfect condition for travel, and I have written here "for any or all speeds?" with a question mark after it. Overrule the objection.

A. Not from the tracks, no.

Q. Did you observe any conditions, any other conditions, upon which you could base a judgment?

(Testimony of Herschel James.)

A. Condition the car was in.

Q. I had reference to the tracks more than to the car. A. No, sir.

Q. Was there anything about the tracks to indicate excessive [137] speed?

Mr. McCabe: To which we object on the ground improper cross examination, and calls for a conclusion of the witness as to what is excessive speed, and not sufficiently definite.

The Court: He said from his experience the road was in perfect driving condition; now, for slow, fast, medium or what? That is all he said, just driving condition. Now he has a right to develop on cross examination what he means by perfect driving condition,—speed or what-not.

A. No, sir.

Redirect Examination

By Mr. McCabe.

Witness: From the point on the road where I observed the car tracks first commenced to turn to the point where the car struck the tree was a distance of probably fifty feet or such a matter, from where the car started to turn toward the tree. As I remember it, he pulled out to the right there and followed along the edge of that little ditch for approximately twenty feet, and then he made that rather abrupt turn to the tree, so that he traveled

(Testimony of Herschel James.)
approximately 70 feet from the point of the first turn.

(Witness excused.)

(Noon Recess)

Mr. McCabe: Your Honor, please, may we call one witness out of order?

The Court: No objection, I presume.

Mr. Toole: No, that is fine. [138]

WILLIAM BERTSCHE,

Sworn as a witness on behalf of the plaintiff, in answer to questions put to him testified as follows:

Direct Examination

By Mr. McCabe.

Witness: My name is William Bertsche. I run the Bertsche Food Market,—a grocery store, at 721 Central Avenue. I was engaged in that business in December, 1934. At that time and prior thereto I had been acquainted with a person by the name of Roberta Doheny, and at that time had arranged or promised to employ her in the month of January following. I observed that she appeared to be the type of person that would make a success in my business. She appeared to be healthy, a strong, robust girl, and had very much of a pleasing personality. To commence her employment, the Union minimum at that time was fifty dollars a month

(Testimony of William Bertsche.)

salary, and as to the range of her salary in the event she proved successful in her work,—the girls I have working for me their salaries run from seventy to ninety dollars a month; those are clerks, and if a girl lives up to the standard with us, in less than six or nine months she would be making seventy dollars a month; after that, it would depend on the girl as to her salary increasing up to ninety dollars a month. She appeared to possess the qualifications that would make a success of her work in my line of business; she had a pleasing personality, which is very important, and she seemed to be in good health and was quick in her motions, and appeared to me that she would make a good clerk.

Mr. McCabe: You may take the witness.

Mr. Toole: No cross examination.

(Witness excused.) [139]

JOE UGRIN,

sworn as a witness on behalf of the plaintiff, in answer to questions put to him, testified as follows:

Direct Examination

By Mr. McCabe:

Witness: My name is Joe Ugrin. I reside in Black Eagle, and was residing there in December, 1934, at which time I was a deputy sheriff of Cas-

(Testimony of Joe Ugrin.)

cade County, and had been acting as deputy sheriff for four years.

On the morning of December 11, 1934, I was called upon, by virtue of my office, to proceed to Simms, Montana, to investigate an automobile accident, and I proceeded to Simms at that time. When I arrived there I saw Roberta Doheny and Marguerite Doheny in Herschel James' house in Simms, and helped to remove the girls from the house to a conveyance to bring them into Great Falls. When I moved these girls into the conveyance, they were moaning, both of the girls were moaning at that time. At that time I observed a Ford automobile against a tree and off to the left of the highway as it went through Simms. Plaintiff's exhibits 1 to 7 inclusive, which you show me, substantially represent the condition of the automobile that I saw at that time crashed, in contact with the tree.

I have had several years' experience in driving automobiles, twenty or twenty five years, probably twenty. During the time I was deputy sheriff I was called upon at different times to investigate accidents or collisions in which automobiles and other objects were involved, and have had experience in determining and in learning the damage that an automobile may sustain when it comes in contact with different objects, cars or stationary objects such as trees or posts, as to illustrate the rate of speed a car was going. From my exami-

(Testimony of Joe Ugrin.)

nation of this car, it is hard to tell the approximate speed this car was traveling at the time it came in [140] contact with the tree, but I would judge, the car completely demolished as that car was, must have traveled at a great rate of speed, probably between forty and fifty miles an hour.

When I went out there I observed the condition of the highway where this car was. I had driven out there with my lights on. In approaching the point where the automobile was, in the light of the car I was able to see the road in front of me clearly. The road was smooth; of course it is a gravel road, loose gravel on it; it was in a safe and good condition for travel by automobile. In traveling at that time with my automobile I did not proceed past the point where the automobile was crashed against the tree. I just left my car sitting on the highway, I believe at a point west of where the automobile was in contact with the tree; no, I left the car just as I got to the wreck, at a point on the south side of the road where the car was in contact with the tree. In driving my automobile I didn't have any difficulty in traversing that road at that time, and had no mishaps or accidents of any kind.

Cross Examination

By Mr. Toole:

Witness: In getting out to Simms that morning I drove at a rate of probably 60 or 70 miles an hour. Right at Simms there the road is straight and about thirty feet wide. I looked at the tracks of this auto-

(Testimony of Joe Ugrin.)

mobile, I examined the tracks after I got there. When he got opposite that tree he made a sharp turn, just about the sharpest turn a man could possibly make. I looked at the tracks to see whether it was skidding or not; I couldn't see that there was; I got there quite a while after; I saw no signs of skidding. The car turned as sharp a turn as a car could possibly make. It was a level, smooth road, with [141] surface gravel, loose gravel on it. I don't know how fast I could turn a Ford V-8 myself on a road and make as sharp a turn as it could make without skidding; make it pretty fast, some people can, and some of them can't; I could go down here and cut the corner at forty miles an hour, right in the city, without skidding. I don't know if I could do it on loose gravel, I never tried it. It is more likely I could do it on loose gravel at 25. I couldn't say from the tracks and the sharpness of the turn whether his speed might have been as slow as 35 instead of 40; I am not judging the tracks, I am judging the car, the condition of the car that was there. I haven't judged the speed from the track; that is hard to judge. I don't know from the tracks how fast he was going.

Redirect Examination

By Mr. McCabe:

Mr. McCabe: Mr. Ugrin, I desire to ask a question I overlooked on direct examination, and if counsel has no objection and the Court has none, I would like to open up that avenue of examination.

(Testimony of Joe Ugrin.)

Mr. Toole: No.

Witness: I have not had very much experience in stopping Ford cars by the use of the brakes; I have had a little. I have a '34 Ford car. I have had occasion to stop my car when I was driving at varying rates of speed, by the use or application of the brakes.

Q. Well, are you able to give us an estimate, in your opinion, within what distance a Ford car of a 1934 model can be stopped, at varying rates of speed?

Mr. Toole: Now, if your Honor please, that is objected to because there is no allegation in the [142] complaint with respect to the brakes upon this car; there is no allegation or no claim that the driver of the car failed to use the brakes; there is no evidence in the record at all with respect to the use of brakes; on the contrary, all of the evidence being that the tracks went along straight without skidding, and therefore this witness' opinion as an expert is incompetent because it does not tend to prove any issue in this case.

Mr. McCabe: The purpose of this is to show that had the driver used his brakes, assuming that he was going at these various speeds, he could have stopped the car.

The Court: That is an inference the jury may draw as well as this witness.

(Witness excused.)

FRANK HOLLAND,

sworn as a witness on behalf of the plaintiff, in answer to questions put to him, testified as follows:

Direct Examination

By Mr. McCabe:

Witness: My name is Frank Holland. I reside at Simms, and resided there in December, 1934. I was acquainted with the condition of the Great Falls-Augusta public highway, graveled highway, that passes through the town of Simms, in December, 1934. On December 11, 1934, there was no snow or ice on that road, and it was dry. I had a service station in Simms at that time, and my brother-in-law did the repair work, the garage. We occupied the same building there, known as the Malmgren Garage. On the morning of December 11 I was called upon to remove a smashed automobile from the public highway at Simms, Montana, to our [143] garage. My understanding was it belonged to Mr. Johnson; I don't know if I heard his initial, and as to his being the Mr. Johnson who was a member of the firm of Coverdale & Johnson, I don't know, I never met the man. At that time I examined the automobile. It was about eight o'clock in the morning that I removed it from the place it occupied on the side of the highway, and at that time I examined and looked over the automobile and saw the condition it was in. Plaintiff's exhibits Nos. 1 to 7 inclusive I identify as pictures of the automobile in question. After I removed it, it was

(Testimony of Frank Holland.)

taken to the garage that my brother-in-law and I were occupying at the time. After it was removed there on the 11th, I don't remember how long it was there, I don't remember just the date that I sold it; I think it was the last part of February. I did not make any repairs or any changes on the automobile from the time I removed it from the place on the highway to the garage where it was placed. On Sunday, December 16, following the day of the wreck of the automobile, it was in substantially the same condition in the Malmgren garage as it was when it was taken from the public highway at the point where it had crashed into the tree. My brother-in-law's name is Rudolph Malmgren. This automobile that was brought into the garage, with respect to the various parts of it other than appeared to be damaged, was practically a new car, it looked. The damages that appeared on it appeared to me to be made as the result of a collision. I did not examine the brakes on that car at that time.

Mr. McCabe: You may cross examine.

Mr. Toole: No cross examination.

(Witness excused.) [144]

C. J. PETERSON,

sworn as a witness on behalf of the plaintiff, in answer to questions put to him, testified as follows:

Direct Examination

By Mr. McCabe:

Witness: My name is C. J. Peterson. I am Sales Manager of the Kincaid Motor Company, and have been for two years and three months. We sell the Ford automobile. I have had experience during the past three years in driving Ford automobiles, and have had experience in driving a Ford V-8 De Luxe Sedan, 1934 model. In driving that particular model of automobile I have had experience in stopping the car on graveled highway at varying rates of speed.

Q. And are you able to state within what distance an automobile of that kind and character, brakes being in working condition, in reasonable working condition, that that automobile may be brought to a stop, within what distance under varying rates of speed?

Mr. Toole: That is objected to upon the ground and for the reason that there is no allegation in the complaint as to failure to stop, as an element of negligence; for the further reason that there is no evidence in this record upon which this witness may base any conclusion with respect to stopping the automobile; further objected to because he is being asked to pass upon a question which is not in evidence.

(Testimony of C. J. Peterson.)

The Court: The statute specifies, under proper allegations, such things may be brought into a case, put in controversy,—section 17 something, I forget what it is, but there is no reference to it whatsoever. I think the objection will have to be sustained.

Mr. McCabe: The only purpose is, we feel the general allegations as they appear in this, that this goes to show failure to use the brakes at any time by [145] the driver of this car, because it further shows that had he used the brakes it could have been stopped within the distance traveled.

The Court: There isn't any allegation as to that.

Mr. McCabe: Remember, your Honor, the words are "so recklessly operated and controlled," not only operated but controlled, and we say the failure to apply the brakes is reckless control. The further allegation is that he drove and controlled it in such a way as to permit it to leave the highway.

The Court: That doesn't have anything to do with the brakes that I can see. I think the section 1742 is likely will probably be offered and given in instruction as to the duty of an operator, but there is no allegation basing any negligence on the failure to observe this. Your allegation does not go that far, but it is like the general duty that the Court in instruction gives as to what the operator of a motor vehicle

(Testimony of C. J. Peterson.)

should or should not do at the time. Sustain the objection.

Mr. McCabe: May the record show at this time that we will be permitted at the conclusion of our case to make offer of proof on this.

The Court: Make it right now.

OFFER OF PROOF

(Out of hearing of jury.)

Mr. McCabe: The plaintiff offers to prove by the witness on the witness stand, C. J. Peterson, that the automobile involved in this action, prior to the time of the collision between said automobile and the tree standing to the south side of the public [146] highway, could have been stopped within a distance of fifty feet going at the rate of fifty miles an hour, had the driver George Bardon applied the brakes on said automobile for the purpose of stopping the same. We further offer to prove by the witness on the witness stand, C. J. Peterson, that going at a rate of speed of forty miles an hour the automobile could have been stopped by the driver, George Bardon, within a distance of forty feet. We further offer to prove by the witness on the stand, C. J. Peterson, that at a rate of speed of 30 to 35 miles an hour the automobile could have been brought to a complete stop by the application of the brakes within a distance of thirty feet.

Mr. Toole: Defendants object to the plaintiff's offer of proof on the ground and for the reason that it calls for a conclusion of the wit-

(Testimony of C. J. Peterson.)

ness, and there are no facts in the record upon which to base any conclusion in response to the question. For the further reason there is no allegation in the complaint charging failure to stop within a reasonable distance, and no allegation in the complaint charging failure to stop as negligence, and no allegation in the complaint under which the offer of proof is admissible or proper or competent evidence.

The Court: I will sustain the objection. Neither way around, however, as to equipment would be proper.

(Witness excused.) [147]

RUDOLPH MALMGREN,

Sworn as a witness on behalf of the plaintiff, in answer to questions put to him testified as follows:

Direct Examination

By Mr. McCabe.

Witness: My name is Rudolph Malmgren. In December, 1934, I was residing at Simms, and was in the garage business at that time, operating the Malmgren Garage with my brother-in-law Frank Holland. I remember at that time a Ford automobile, '34 Model De Luxe V-8 Sedan being brought to the garage on December 11, 1934, and it remained in the garage 'til about the last of February. From

(Testimony of Rudolph Malmgren.)

the time it arrived at the garage I did nothing towards changing the car in any manner, and it was in the same condition substantially on the Sunday following the time it was brought to the garage that it was when it was brought into the garage. At that time I examined the steering apparatus connected with that car. I found it was still intact, but it had been cracked, not a worn crack, but a sharp sudden crack. I have had experience in operating cars and automobiles in which the steering apparatus became out of order while I was driving the car.

Q. And when a steering apparatus goes out of order, what happens with respect to the car taking quick sudden turns, or what is the fact?

Mr. Toole: That is objected to as being entirely immaterial, not tending to prove any issue in this case, and incompetent, inadmissible under the pleadings. In the first place, your Honor please, I should elaborate also because counsel is taking an inconsistent position; a moment ago he stated the purpose was to show the car was in good order (Note: Objection was made to the question concerning the steering apparatus, and the [148] objection withdrawn on the statement of plaintiff's counsel that "I am going to show the car was not in a defective condition.") on the first question, and this question is directed to the proposition that if the car had been in bad order

it would have acted in some way differently than what it did.

The Court: You are familiar with some decisions where a thing happens sudden, nobody knows anything about it, to the fact of it. Do you still hold to your objection?

Mr. Toole: Yes, your Honor.

The Court: Very well; have to be sustained then.

Witness: Plaintiff's exhibits 1 to 7 show substantially the condition the car was when it was brought into the garage on the morning of December 11, 1934. I examined the front part of the car above the windshield after it came into the shop, and noticed something that looked like white skin on the top above the windshield.

Mr. McCabe: You may take the witness.

Mr. Toole: No cross examination.

(Witness excused.)

NELLIE B. FULLER,

Sworn as a witness on behalf of the plaintiff, in answer to questions put to her testified as follows:

Direct Examination

By Mr. McCabe.

Witness: My name is N. B. Fuller. I reside at 718 Second Avenue North, Great Falls, and was residing there in December, 1934, and particularly

(Testimony of Nellie B. Fuller.)

on the 12th day of December, 1934. I am a stenographer, and was such on December 12, 1934. I was [149] present at a coroner's inquest conducted by Dr. B. A. Place on the evening of December 12, 1934, to enquire into the death of Roberta Doheny and Marguerite Doheny. At this inquest witnesses were examined by Dr. Place after being placed under oath, and I took down the testimony of the witnesses in shorthand, and after that correctly transcribed it into longhand on the typewriter, and after that the original transcript of the testimony was filed with the Clerk of the Court of Cascade County, Montana. This typewritten transcript of evidence is the transcript of the testimony taken at the time of the coroner's inquest, correctly transcribed from my shorthand notes into longhand typewriting. At the time of the inquest I accompanied Dr. Place, the Coroner, to the Deaconess' Hospital for the purpose of taking the testimony of Mr. Oscar Johnson, and at that time Dr. Place placed Mr. Johnson under oath to testify to the truth, the whole truth and nothing but the truth before he asked him any questions. About the first of this year, I was cleaning out some papers and destroyed the original shorthand notes that were taken at the time of the inquest, so that they are not available at this time.

Mr. McCabe: You may take this: Counsel agrees if he can examine this testimony, we can shorten up the time.

(Testimony of Nellie B. Fuller.)

Mr. Toole: We have no objection.

Mr. McCabe: Well, I presume it may be stipulated that the testimony given by Mr. Johnson at that time may be read into the record in this case.

Mr. Toole: No, you read it. That is, I of course make the same objections to it that I have to all the evidence, that it is not competent under the pleadings. In order to shorten the time, I have no objection to that deposition being read to the jury. What I meant [150] to say was I did not want to stipulate that, in view of the objections I have made to the pleadings, fundamental objections, if it was competent,—that was all. I made the objection that the complaint does not state a cause of action, and that is what I meant. I did not want to find myself stipulating that any evidence in the case is competent, in view of my objection.

DEPOSITION OF OSCAR JOHNSON,

given at Coroner's Inquest:

OSCAR JOHNSON,

Sworn as a witness by the Coroner, in answer to questions put to him testified as follows:

Examination by Dr. B. A. Place, Coroner

My name is Oscar Johnson. I live at Helena. Tuesday morning about five o'clock I was out by

(Deposition of Oscar Johnson.)

Simms. I was in an automobile accident. I was sitting on the back seat; another fellow was sitting in front; I was half asleep; it was pretty cold and I was covered up with a coat; I had it up over my head and I don't know much what happened. We were traveling about 35 miles an hour when the accident happened. Some fellow at a farm house came and helped us into the house. My arm was broken and I had a sore leg. They got Bardon out and left him on the ground and the rest of us went into the house. A man helped me to walk to the house, then they laid me down on a bed and the doctor fixed me up. Marguerite and Bobby and me were in the car; Bardon was driving. Marguerite and Bobby are the Doheny girls. The party had not been drinking. Nobody had any intoxicating liquor of any kind. None of us were intoxicated.

Q. The jury wants to know if you felt sleepy. It was about five o'clock in the morning and none of you had been to bed. How did you feel?

A. I guess I was sleepy; I can't tell much what did happen. I guess I was about half asleep, then it seemed to me something [151] happened some way or other.

Witness: I have no theory myself what might have happened to the driver; everything went smooth all the way through. As far as I know, it was a smooth, uneventful trip from Great Falls to Simms. We came to Great Falls in the first place around eleven thirty, I imagine, at night;

(Deposition of Oscar Johnson.)

I'm not sure; I think it was eleven thirty; I have no watch. It was probably sooner than that. It was quite a while after supper. We all dressed at the hotel and then we waited for a while and after that we left. We were at the Randall Hotel in Augusta. As to whether the driver fell asleep, I couldn't tell you what happened. That probably would be the main theory, I don't know though. It was my car this man was driving; it was in good order; it was a V-8 Ford sedan, de luxe sedan. Marguerite was in the back seat with me; Bobby was in front. Any time previous to the accident the driver did not say anything about feeling sleepy, that I know of. He acted like everything was lovely. I couldn't see anything wrong anywhere.

(Witness excused.)

MRS. AMELIA MOSIER,

Sworn as a witness on behalf of the plaintiff, in answer to questions put to her testified as follows:

Direct Examination

By Mr. McCabe.

Witness: My name is Amelia Mosier. I reside at Augusta, Montana. Prior to December 11, 1934, I was acquainted with Roberta Doheny and with Marguerite Doheny. They had been employed by me at housework and cooking. The girls both got salaries of $25 and $30 a month, at different times,

(Testimony of Mrs. Amelia Mosier.)

that is, later $30 a month. In addition to that they got their board and room, which I always [152] consider about a dollar a day, so that I figured their salary when they finally left was equivalent to sixty dollars a month. Marguerite was employed at the same kind of work; I paid her the same salary, and she likewise got board and room in addition to her salary. The work they were doing was work of a continuous and steady nature. Roberta was a very healthy girl, very strong, robust, and was very industrious, honest and a very pleasing personality, and very dependable. Marguerite was of healthy appearance, strong and robust, industrious, very pleasing personality, honest and could be depended upon very much. This employment of these girls was off and on in 1933 and 1934.

Cross Examination

By Mr. Toole.

Witness: When I say off and on, I mean maybe a month or so at a time; I can't just remember or recall it. I wouldn't say, unless I looked up my records, how many months I had Roberta employed; I wouldn't say whether it was six months during those two years. I don't recall with respect to Marguerite either, I wouldn't say because I would have to look up my records first.

(Witness excused.)

MRS. J. S. (HELEN) BOHLER,

Sworn as a witness on behalf of the plaintiff, in answer to questions put to her testified as follows:

Direct Examination

By Mr. McCabe.

Witness: My name is Helen Bohler. I reside at Augusta. In the year 1934 and previous years I was acquainted with Roberta Doheny and Marguerite Doheny. During those years these girls were employed by me at different times at housework and cooking. I paid them twenty five and thirty dollars, depending on the [153] season; during haying season they got $30 a month, for a month or six weeks, and the rest of the time $25 a month. In addition to that they got their room and board, and a fair estimate of that would be a dollar a day. These girls were employed more during the summer months, spring and summer. I couldn't say of my own knowledge whether they were employed other places when they were not working for me. I never heard they were employed other places. Roberta Doheny, when she was in my employ, appeared to be very healthy and robust; in her habits of industry she was very conscientious, a dependable girl, honest, and very pleasing personality. Marguerite Doheny was in very good health, very robust, honest, very dependable and with a very pleasing personality.

(Testimony of Mrs. J. S. (Helen) Bohler.)

Cross Examination

By Mr. Toole.

Witness: As to whether either of the girls was ever married I don't know, I am sure; I understood they were single.

(Witness excused.)

MRS. MINA C. RANDALL,

Sworn as a witness on behalf of the plaintiff, in answer to questions put to her testified as follows:

Direct Examination

By Mr. McCabe.

Witness: My name is Mina C. Randall. I reside at Augusta, Montana. I am in the hotel business, and during the year 1934 was conducting a hotel at Augusta; during that time I was acquainted with Marguerite Doheny. On the 12th day of December, 1934, Marguerite Doheny was in my employ, and had been prior thereto, doing general housework. She had been in my employ six weeks. I paid her a salary of $25 a month, and in addition to that she [154] received her room and board as part of her compensation, which I figured at $35 a month, making a money equivalent of $60 a month. The work she was doing was more or less of a continuous and steady character. There was a good demand for services of that kind in the vicinity of

(Testimony of Mrs. Mina C. Randall.)

Augusta. During the time she was in my employ her health I would say was very good; she appeared to be a strong, robust girl; she was honest and dependable, and very industrious. On the evening of December 10, 1934, I did not see Marguerite Doheny and Roberta Doheny and Mr. E. O. Johnson and other persons leave my hotel to go to Great Falls, Montana, but I seen them all going out of the hotel in a group about eight o'clock in the evening. Mr. E. O. Johnson is also known and goes by the name of Oscar Johnson; they are one and the same person.

Mr. McCabe: I believe that is all.

Mr. Toole: No cross examination.

(Witness excused.)

HUGH I. SHERMAN,

sworn as a witness on behalf of the plaintiff, in answer to questions put to him, testified as follows:

Direct Examination

By Mr. McCabe:

Witness: My name is Hugh I. Sherman. I reside at Great Falls, Montana. I am in the life insurance business, employed with the Northwestern Mutual principally. I have been in the insurance business a little over twenty years. I am acquainted with the standard tables known as The American Mortality Tables. I have them with me. As a part

(Testimony of Hugh I. Sherman.)

of those tables there is also a set of tables known as Annuity Tables. On December 11, 1934, a girl in apparent good health and who at her last birthday was [155] eighteen years of age would have a life expectancy of 43-5/10 years; that is the average length of time she would be expected to live. A girl 20 years of age would have an expectancy of life of 42-2/10 years. The cost to purchase an annuity that would bring to a girl of eighteen an income of $60 a month, to pay down in a lump sum which would guarantee her $60 a month for the rest of her life, would be $19,373.04. For a girl of twenty years of age to purchase an annuity which would pay her at the rate of $60 a month for the balance of her life would require a lump sum payment, immediate payment, of $19,094.40.

As to what it would cost to purchase an annuity for a girl of the age of eighteen years that would bring her an income of $50 per month, I will have to multiply that out; the table gives it on the basis of ten dollars; it would cost $16,144.20.

To purchase an annuity to pay a girl at the age of eighteen $55 a month for the rest of her life would cost $17,758.62.

To purchase an annuity to pay a girl of the age of twenty years $55.00 a month for the rest of her life would cost $17,543.20.

These mortality tables are the tables that are used by my insurance company, and are generally used by all insurance companies; every State in the

(Testimony of Hugh I. Sherman.)

Union requires the life insurance companies of the United States to use the American Mortality Tables.

Mr. McCabe: You may cross examine.

Mr. Toole: No cross examination.

(Witness excused.) [156]

HARRY DOHENY,

sworn as a witness on behalf of the plaintiff, in answer to questions put to him, testified as follows:

Direct Examination

By Mr. McCabe:

Witness: My name is Harry Doheny. I was the father of Roberta Doheny and Marguerite Doheny. Roberta Doheny on December 11, 1934, was past 18 years of age, was 18 in April before, and Marguerite was twenty years of age the August before. They had gone to high school; Marguerite had completed her high schooling, and Roberta I think had gone up to her last year, she had gone three years. After the girls left high school they worked around in different places. Roberta during her lifetime enjoyed absolutely good health all the time, and the same condition in health as to Marguerite. The girls were industrious, and very strong and robust. On or subsequent to December 11, 1934, I received information of the injuries which Roberta Doheny and Marguerite Doheny received in an automobile collision, and after that Roberta and Marguerite

(Testimony of Harry Doheny.)

each passed away, died. After the death of Marguerite and Roberta I did not receive any communication, written or oral of any kind, from Mr. E. O. Johnson or Mr. John M. Coverdale relative to the collision in which my two daughters had been injured. I attempted to obtain information from Mr. E. O. Johnson relative to those injuries, but he would give me no information at all.

Cross Examination

By Mr. Toole:

Witness: I don't remember the exact dates I last saw Mr. Johnson, but it was after he got out of the hospital in Great Falls, and I think he was there four or five days. He did not up and leave the country, he came back up to Augusta, I think about five or six, maybe seven, days after the accident, and I [157] think he was there possibly for three weeks after that, maybe a month, I don't recollect. I didn't hear from him since then, and I didn't try to find him; I have enquired of his whereabouts but I could find out nothing, couldn't locate him. I do not know where he is now.

(Witness excused.)

MRS. ETHEL M. DOHENY,

sworn as a witness in her own behalf, as plaintiff, in answer to questions put to her, testified as follows:

(Testimony of Mrs. Ethel M. Doheny.)

Direct Examination

By Mr. McCabe:

Witness: My name is Ethel M. Doheny. I reside in Augusta and was residing there in December, 1934. I was the mother of Roberta and Marguerite Doheny. In the month of December, and particularly on the 11th of December, 1934, I received information that Roberta Doheny and Marguerite Doheny had been injured in an automobile accident, and thereafter Roberta and Marguerite Doheny each died. Roberta's age on the 11th day of December, 1934, was eighteen, and Marguerite's age on that date was twenty. Roberta's health during her lifetime had been very good, and Marguerite during her lifetime also had very good health. Marguerite was employed steady when she left high school; she graduated from high school. I know the two girls were employed at different times and received payment for the work they did prior to the time of their death. Roberta had schooling up to her junior year in high school; she left high school in her junior year. Marguerite graduated from high school in 1933. After the time of the injuries and death of Roberta Doheny and Marguerite Doheny I received neither oral nor written communication [158] from Mr. E. O. Johnson or Mr. John M. Coverdale with reference to the collision or the circumstances or cause of it.

Mr. McCabe: You may take the witness.

Mr. Toole: No cross examination.

Mr. McCabe: The plaintiff rests, your Honor.

(Recess.)

MOTION

(Out of hearing of jury.)

Mr. Toole: Come now the defendants, John M. Coverdale and Coverdale and Johnson, a co-partnership, each for himself and each separately, and each in the respective cases of Ethel M. Doheny as Administratrix of the Estate of Roberta Doheny against John M. Coverdale and E. O. Johnson and in the case of Ethel M. Doheny as Administratrix of the Estate of Marguerite Doheny and against Coverdale and Johnson and E. O. Johnson, and move the Court for a judgment of nonsuit in favor of the said defendants, and in favor of each of them, and against the plaintiff in each of said cases, upon the ground and for the reason:

1.

That the complaint does not state facts sufficient to constitute a cause of action against these defendants or either of them, either jointly or separately.

2.

That the complaint does not state facts sufficient to constitute a cause of action against these defendants either jointly or separately in either of said cases under the Montana Guest Law.

3.

That the plaintiff has failed to offer proof sufficient to sustain the allegations in the complaint or sufficient to sustain [159] a verdict against these

defendants, or either of them, in either of the said causes under the Montana Guest statute.

4.

That the plaintiff has failed to offer and introduce proof sufficient to sustain a verdict against these defendants, or either of them, in said causes for the following reasons:

(a) That there is no sufficient proof of negligence to sustain a verdict.

(b) That there is no sufficient proof of gross negligence and reckless operation of the automobile of E. O. Johnson to sustain a verdict against either of the defendants, either separately or jointly, in either of said cases.

(c) That there is no sufficient proof to sustain a verdict against either of the said defendants, jointly or separately, in either of the said causes, and no sufficient proof to show that either E. O. Johnson or George Bardon were acting within the scope of their employment, or acting as the servants or agents or employees of either the defendant Coverdale as an individual or the defendant Coverdale and Johnson as partners, and there is no sufficient proof to sustain a verdict by reason of the fact that there is no proof to show, or proof, that either the said Bardon or the said E. O. Johnson were acting within the scope of the business of the partnership, or acting within the scope of their employment, in inviting or permitting the Doheny girls to ride with them, or either of them, in the Johnson car at the time of the accident.

(d) That there is no sufficient proof of a duty owed to either of the Doheny girls in either of said cases by either of the defendants, John M. Coverdale or Coverdale and Johnson.

(e) That there is no sufficient proof to sustain a verdict, [160] by reason of the fact that the proof fails to show that either the defendant John M. Coverdale or Coverdale and Johnson failed to perform any duty owing to either of the Doheny girls in either of the cases.

(f) That there is no sufficient proof to sustain a verdict, because the proof fails to show that the injuries received by, and the death of, the two Doheny girls was proximately caused by the gross negligence and operation of said automobile by either the defendant John M. Coverdale or the defendant Coverdale and Johnson.

Mr. Toole: We have fairly short evidence, and the same motion will be made at the close of the trial. Perhaps your Honor will prefer to hear arguments at that time.

The Court: Yes, I think it will be better.

Mr. Toole: Perhaps I didn't express myself properly. Of course it would be proper to move for a directed verdict at the close of the case, and the Court may of course reserve a ruling on motion for nonsuit. There should be a ruling on that, however, before the case is closed.

The Court: Denied, subject to remaking it. [161]

DEFENDANTS' CASE

FRANK HOLLAND,

having been previously sworn, called as a witness on behalf of the defendants, in answer to questions put to him, testified as follows:

Direct Examination

By Mr. Toole:

Witness: I took the witness stand this morning and testified on behalf of the plaintiff in this case. I am the same Mr. Holland who testified this morning. I said that I operate a service station and garage at Simms, and that is the point at which this accident occurred. I was operating the garage and service station there on the 10th and 11th of December, 1934. I said that on this morning I went out to the scene of the accident at about eight o'clock and that I then and there observed the condition of the car and the position it was in. I wasn't in the garage business myself, my brother-in-law ran that part of it, mechanical part, and I only took care of the service station part. I have not been in the automobile repair business myself. I have had occasion while in the business to observe quite a few automobile accidents, and when I went out there that morning I looked at the position of the automobile with respect to the tree. According to the tracks, the automobile was going west on the right-hand side of the road, and about 80 feet from the tree it made a gradual turn into the tree and struck the tree a little bit to the left of the

(Testimony of Frank Holland.)

center of the car, that is, the front end of the automobile, the radiator, struck the tree at a point a little to the left of the center. When the car struck the tree on the angle it was headed, a little bit southwest, kind of on a southwest angle, the hind end of the car, or the rear end, slid about eight or ten inches west; in other words, the hind end of the car moved about eight or ten inches after [162] it struck the tree, it slid, you could see on the ground where the tires had slid.

Q. State whether or not, from what you saw there, you are able to express an opinion as to how fast that car was going when it hit that tree.

Mr. McCabe: To which we object on the ground and for the reason the witness has not shown himself competent to testify, and there is no proper foundation for his evidence.

The Court: He said he had observed several automobile accidents. Better have him describe what kind of accidents he had seen.

Witness: I have seen automobiles where they have collided with one another, but I never saw where one had run into a tree just exactly like this one. I don't believe I ever saw two automobiles hit each other, only after the accident happened; I never happened to be an eye-witness to two of them going together. I have seen their condition after they hit.

Q. And taking the condition of the car and the position it was in, the track, and the way it hit the

(Testimony of Frank Holland.)

tree, could you tell at about what speed it would have been traveling, to have been in that position after it hit?

Mr. McCabe: To which we object, on the ground the witness has not shown himself qualified to answer, no proper foundation has been laid, and there is no fact upon which the witness can express an opinion in this case as to the speed the car was traveling at the time.

The Court: You understood the question; can you do that? A. I think I can, yes. [163]

The Court: It is said in Section 100 of Schwartz on Automobile Accidents that "the probable speed of the machine, in turn, indicates the force of the blow," or how the driver was operating the same; and in section 292, that the position after impact may be shown, and that the whole is for the jury to decide, draw its own conclusion therefrom after the testimony. He may answer.

A. Well, the position the car was sitting in, the angle it was on the tree, it had not been traveling at a high rate of speed.

Mr. McCabe: To which we ask the witness to confine himself to the question, please. The question was whether or not he could do it.

The Court: He says, not a high rate of speed, and you can give your reasons after you have testified, as to the rate of speed.

(Testimony of Frank Holland.)

A. I beg pardon.

Q. I will ask you another question, then. Now then, Mr. Holland, what in your opinion was the rate of speed of that automobile when it hit the tree?

Mr. McCabe: To which we make the same objection.

The Court: He may answer.

A. Well, I would say not more than 25 miles an hour at the most, and possibly less.

Q. Now, why do you say that?

A. Well, for the simple reason that the car, the angle it was sitting agin the tree, when it came into it if it had been traveling at a high rate of speed the rear end of the car would have probably went clear around toward the west, and it only skidded about eight or ten inches. [164]

Cross Examination

By Mr. McCabe:

Witness: I don't believe the car could have been going more than 25 miles an hour or the rear end of the car would have slued around farther than it did. I don't believe it could have been going at that time as high as 35 miles an hour.

(Witness excused.)

RUDOLPH MALMGREN,

having been previously sworn, called as a witness on behalf of the defendants, in answer to questions put to him testified as follows:

Direct Examination

By Mr. Toole:

Witness: I testified when I was on the stand before that I live at Simms and engaged in the automobile and garage business there. I have been engaged in the garage business eleven years. During that time I really have never seen any wrecks only after they was pulled in. I have seen automobiles after they were pulled in, and have repaired a few of the small wrecks in our garage. I have not examined a good many bad wrecks in our garage; I have, since I have been in the garage business, observed cars in one state or another in wreckage, and repaired them where the job wasn't too big for our garage. I seen the car in which Mr. Johnson and Mr. Bardon and the Doheny girls were riding that hit the tree at Simms on December 11th, after it was pulled up to the garage, and looked it over. I observed it so that I am in position now to express an opinion as to how fast that car was going when it hit the tree, approximately.

Q. And what would you estimate as the approximate rate of speed when it hit that tree?

Mr. McCabe: To which we object on the ground that [165] there is no proper foundation laid, the witness has not shown himself quali-

(Testimony of Rudolph Malmgren.)

fied to answer, there is no evidence in the record to sustain any opinion as to this witness as to the speed of the car.

The Court: Sustain the objection as to this witness.

(No cross examination)

(Witness Excused)

JOHN M. COVERDALE,

Sworn as a witness for and on behalf of the defendants, in answer to questions put to him testified as follows:

Direct Examination

By Mr. Toole:

Witness: My name is John M. Coverdale. I live at Anaconda, Montana. I am the Coverdale who is one of the defendants in the two suits here involved. I have been in Anaconda steady, my home has been in Anaconda since 1921. I work at the zinc concentractor there for the Anaconda Copper Mining Company; I am in their employ five days a week, on day wages; I am classed as an operator. Last December, 1934, I was a member of the firm of Coverdale and Johnson; I do some bridge work at times, small contracts. I had a contract for some bridge work at Augusta during December, 1934; Mr. E. O. Johnson was a partner at that time, we

(Testimony of John M. Coverdale.)

had the work together. Mr. Johnson is not now my partner; we dissolved partnership sometime last May.

I am familiar with the V-8 automobile which Mr. Johnson owned. It was never owned by the partnership. It was Mr. Johnson's automobile. I had an automobile of my own, and still have.

On the night of December 10, 1934, I was at my home in Anaconda. I left Augusta, I think, about the 8th of December, [166] 1934, and went directly to Anaconda, and left Anaconda the afternoon of the 11th and started back for Augusta after I heard of the wreck; that was after this accident. I last saw Mr. Johnson for a few minutes sometime, I believe, last February, when I spoke to him about this case and asked him to come here at the trial. He said there had been no papers served on him. I haven't seen him since and do not know where he is now.

It is a fact I have never been to see Mr. and Mrs. Doheny, as they testified, since this accident. The explanation is that I felt as if I wasn't responsible for it and wasn't connected with it in no way, shape or form, and it never occurred to me to go see them, never thought of it.

Cross Examination

By Mr. McCabe:

Witness: I left Augusta December 8, 1934, and went to Anaconda. Prior to that, most of the time, when this contract work commenced, I was in Au-

(Testimony of John M. Coverdale.)

gusta; I wouldn't say all the time. I couldn't tell you the number of days I would be away from the job up to the 8th of December, 1934; I made a trip to Hamilton, and I went over to see my family several times, but as an average I was on the job at Augusta on this contract five to six days a week. Mr. Johnson was not likewise on the job with me during that time; Mr. Johnson was gone to Spokane for a couple of weeks, ten days I think it was, yes, and he was up to the Piskin Dam quite a bit. We had a contract also at Piskin and Mr. Johnson worked on the Piskin Dam job and also on the Augusta job at times. During all that time he resided in Augusta, that was his residence while the work was going on. I couldn't say that Mr. Johnson was left in charge of the work when I left December 8, 1934; I had two foremen there. He was my general partner there. It was [167] up to him to stay there if he wanted to; I had two foremen on the job. He was at Augusta when I left, but we had two foremen taking care of the job. As to whether he was the head man on the job, it just depends whether the foremen would call on him or not for any information. Mr. Johnson was my partner, and when I went to Anaconda he was at Augusta when I left; he was the only member of the partnership on the job after I left there.

I am acquainted with the automobile of Mr. Johnson and also my own automobile, and they were owned by us as individuals. He used his car and I

(Testimony of John M. Coverdale.)
used mine in connection with the work that we were doing, the partnership business.

Mr. McCabe: That is all.

(Witness Excused)

Mr. Toole: Defendant rests, your Honor.

(No rebuttal)

The Court: Gentlemen of the jury, the case is now closed, as far as the testimony is concerned, and you will be excused until tomorrow morning at half past ten. In the meantime you are under the admonition of the Court heretofore given you, not to make up your mind relative to the case, nor permit anyone to talk to you about it; the case is not submitted to you, as you know. So you will be excused and return here tomorrow morning at 10:30.

Mr. Toole: Your Honor, please: Now come the defendants John M. Coverdale and Coverdale and Johnson, a partnership, and in each of the cases heretofore referred to, separately in each case and separately on behalf of each defendant moves the Court to direct a verdict and direct the jury to return a verdict [168] against the plaintiff and in favor of the defendant John M. Coverdale in each of said causes, and against the plaintiff and in favor of Coverdale and Johnson in each of said cases, upon the ground and for the reason that the plaintiff in each of said cases has failed to prove by a

preponderance of the evidence that the injuries to, and death of, the Doheny girls was due to any gross negligence and reckless operation of the said automobile by either of the said defendants; that the plaintiff in each of the said cases has failed to prove by a preponderance of the evidence that either of the defendants, John M. Coverdale or Coverdale and Johnson, were guilty of any gross negligence or reckless operation of the said automobile; that the plaintiff in each of said cases has failed to prove by a preponderance of the evidence that the said E. O. Johnson or George Bardon, in inviting the Doheny girls to ride with them in the said V-8 Ford Automobile, were acting in any manner for and on behalf of the partnership, or acting in any manner in the furtherance of the business or the scope of the business of the partnership. Plaintiff has failed to prove by a preponderance of the evidence in each of said cases that these defendants, or either of them in either of the cases, owed any duty to the said Doheny girls or either of them. Plaintiff has failed to prove in said cases that either of these defendants violated or breached any duty owed by either of them to either of the Doheny girls; and the plaintiff has failed to prove by a preponderance of the evidence that any breach of any duty owed by either of these defendants to either of the Doheny girls was the proximate cause of any damage or injury or death of the Doheny girls.

My associate calls my attention to the fact that I should add to that motion also that the plaintiffs

have failed to prove [169] the allegations contained in the complaint by a preponderance of the evidence.

(Adjourned to 9:30 a. m., May 1, 1936)

May 1, 1936

(Extended argument on Motion)

The Court: . . . motion for a directed verdict will be denied.

Mr. McCabe: That ruling extends, your Honor, to both cases?

The Court: Yes sir. [170]

SETTLEMENT OF INSTRUCTIONS

And thereupon, in the absence of the jury, and present the judge who tried the said cause, the attorneys for the respective parties and the court stenographer, the following proceedings were had with reference to the settlement of instructions:

Mr. Toole: Now come the defendants and offer on behalf of each of the defendants in each of the said cases, their offered Instruction lettered "A". Which said instruction is as follows:

> The jury is instructed that a general partner has authority to do whatever is necessary to carry on the business of the partnership in the ordinary manner, and that a partner has no authority to do any other act not within the scope of the ordinary business of the partnership.

The Court: The Court refuses to give Defendants' Offered Instruction lettered "A" in each of said cases.

Mr. Toole: To which refusal of the Court the defendants, and each of them, except.

Mr. Toole: Come now the defendants and object to Court's Instruction No. 3, upon the ground and for the reason that there is no allegation in the complaint upon which to base that instruction, and no proof in the record, and for the further reason that it is not the law in this case.

The Court: Overruled.

Mr. Toole: To which ruling of the Court the defendants and each of them then and there duly except.

Mr. Toole: Come now the defendants and object to Court's [171] Instruction No. 6, upon the ground and for the reason that none of the acts of George S. Bardon or E. O. Johnson in connection with the invitation or the presence of the Doheny girls to ride in the automobile is binding upon or brought home to the defendants John M. Coverdale and Coverdale & Johnson.

The Court: Overruled.

Mr. Toole: to which ruling of the Court the defendants and each of them duly except.

Mr. Toole: Come now the defendants and object to Court's Instruction No. 7, on the ground and for the reason that there is no evidence in the record to sustain the jury in finding that George S. Bardon operated said automobile in a grossly negligent and

reckless manner, and that, even if he did, such operation and conduct on his part would not, under the pleadings and the proof in this case, bind either of the defendants John M. Coverdale or Coverdale & Johnson, and that his gross negligence could not be that of the partnership or of John M. Coverdale.

The Court: Overruled.

Mr. Toole: To which ruling of the Court the defendants and each of them duly except.

Mr. Toole: Come now the defendants and object to the giving of the Instruction No. 16 A, by the Court, upon the ground and for the reason that it does not correctly state the law in this case, and there is no allegation in the pleading or any sufficient evidence upon which to base the said instruction.

The Court: Overruled.

Mr. Toole: To which ruling of the Court the defendants and each of them duly except. [172]

Mr. Toole: Now come the defendants in each of the said cases and on behalf of each of the defendants object to the modification of defendants' instruction, which is Court's Instruction No. 16, as modified, the objection being to the Court's action in striking out the words "and in furtherance" as the same appears in the original instruction between the words "scope" and "of" at the point where they appear for the second time in said instruction.

The Court: Overruled.

Mr. Toole: to which ruling of the Court the defendants and each of them duly except.

And thereafter, the Court instructed the Jury as follows:

INSTRUCTIONS TO THE JURY

Gentlemen of the Jury:

This action has been commenced by the plaintiff, as administratrix of the Estate of Marguerite Doheny, deceased, (and another action by the same plaintiff as administratrix of the Estate of Roberta Doheny, deceased, and these instructions apply to each of said cases), against the defendants, John M. Coverdale and E. O. Johnson, co-partners doing business under the firm name and style of Coverdale & Johnson, to recover damages in alleged sum of Fifty Thousand and Fifty Dollars ($50,050.00) arising out of injuries and death of Marguerite Doheny, and for a like sum of $50,050.00 arising out of injuries and death of Marguerite Doheny, which plaintiff alleges was the result of the grossly negligent and reckless manner of operation of a certain Ford V-8 Sedan automobile being driven by one George S. Bardon as an alleged employee of the defendants under the direction of defendant E. O. Johnson, on the 11th day of December, [173] 1934.

The complaint alleges the following facts which the defendants by answers have admitted and therefore plaintiff is not required to prove such facts, to-wit: the death of Marguerite (and Roberta) Doheny on December 12th, 1934, and the appointment and qualification of plaintiff as administratrix of her estate, and that the defendants on December 11th, 1934, were co-partners doing business under

the firm name and style of Coverdale & Johnson; and that during the month of December, 1934, defendant, E. O. Johnson, was the owner of a certain Ford V-8 Sedan automobile involved in this action, Montana License No. 13-1865 for the year 1934;

That prior to December 11th, 1934, one George S. Bardon was an employee of the defendant partnership and was engaged in work directly connected with the business of the partnership in the performance of a certain Highway Contract theretofore entered into by the defendants and the Highway Commission of the State of Montana, and which written contract was for the construction and improvement of certain bridges and stock passes; and that a period of time between on or about September 25, 1934, and February 1st, 1935, was consumed in the performance of said contract;

That on or about October 20th, 1934, the defendants rented from E. H. Blakeslee an Ersted two drum hoist with tractor power to be used in connection with the performance of the aforesaid contract with the State of Montana and agreed to return and redeliver said hoist with tractor power to said E. H. Blakeslee in the event same should be used for a period exceeding thirty days; That defendants took possession of said hoist on or about October 20th, 1934, used same in connection with the performance of aforesaid contract with the State of Montana for a period of approximate- [174] ly fifty-two (52) days and that thereafter, at a time known to defendants but unknown to plaintiff, and between Decem-

ber 1st, 1934, and December 11th, 1934, the defendants shipped said Ersted two drum hoist with tractor power to Great Falls, Montana, for the purpose of redelivering same to the said E. H. Blakeslee.

The following allegations of fact in plaintiff's complaint are denied by the answers of defendants and therefore the plaintiff must by evidence prove such allegations, to-wit:

That on or about the 10th day of December, 1934, at approximately 10 o'clock P. M. the aforesaid E. O. Johnson and George S. Bardon left Augusta, Montana, traveling in the above mentioned automobile owned by E. O. Johnson with Great Falls, Montana, as their destination for the purpose of unloading and delivering to E. H. Blakeslee at Great Falls, Montana, in accordance with the terms of the aforesaid written agreement, the aforesaid equipment theretofore rented by the defendants from the said Blakeslee and at the request and invitation of said E. O. Johnson and George S. Bardon to accompany them to Great Falls, Montana, while they unloaded and delivered aforesaid equipment and thereafter return to Augusta, Montana, the said Marguerite Doheny and sister Roberta Doheny accompanied said E. O. Johnson and George S. Bardon to Great Falls, Montana, in said automobile arriving at Great Falls, Montana, at approximately 11:35 P. M. on the day of December 10th, 1934. That upon their arrival at Great Falls, Montana, the aforesaid equipment was unloaded and delivered by said defendants to E. H. Blakeslee by and through the as-

sistance at the time of the said E. O. Johnson and George S. Bardon. That after said equipment was unloaded and delivered to the said E. H. Blakeslee the said E. O. Johnson and George S. Bardon, Marguerite Doheny and Roberta Doheny left Great Falls, Montana, in the above mention- [175] ed automobile with Augusta, Montana, as their return destination and by way of that public highway known as the Great Falls-Augusta road which is the main highway for public travel between Great Falls, Montana, and Augusta, Montana. That at all times from and after the said persons left Great Falls, Montana, up to and including the time the automobile in which they were riding left the public highway and collided with the tree as hereinafter set forth the said George S. Bardon drove, operated and controlled the movements of said automobile under the direction of the said E. O. Johnson.

That when said automobile with the occupants aforesaid arrived at a point within Cascade County, Montana, on said public highway where same has and takes its direction and course through the town of Simms, Montana, the said George S. Bardon, while in the employ of the defendants as aforesaid and while under the direction of E. O. Johnson, drove and controlled said automobile in such a grossly and reckless manner that said automobile while traveling at a speed of approximately between fifty and sixty miles an hour was permitted by him to turn directly from and move off and from said public highway and crash into and collide with a

large tree growing approximately twelve feet away from and to the side of said public highway in said Cascade County, Montana. That at the time and place on said highway when and where said automobile was permitted by the said George S. Bardon to leave said highway and collide with the tree aforesaid the said highway was approximately thirty feet wide in good and safe condition for travel by automobile and other means of conveyance and extended in an approximate straight line with a clear and unobstructed view for a distance of approximately one-half mile West and approximately one mile East from the place on said highway where the automobile [176] driven at the time by aforesaid George S. Bardon was permitted by said George S. Bardon to leave the public highway and crash into the tree as aforesaid.

That by reason of said automobile being permitted by the said George S. Bardon and the said E. O. Johnson to move off of and away from the public highway and collide with and crash into the tree as aforesaid the said Marguerite Doheny (and Roberta Doheny) was thrown and hurled against the front seat and interior of the said automobile with great force and violence and her body was battered, bruised and cut and as a result thereof she suffered and sustained severe and serious bodily injuries and suffered great bodily pain and mental anguish and thereafter on or about the 12th day of December, 1934, as a result of the injuries sustained by her as aforesaid Marguerite Doheny (and

Roberta Doheny) died all to her great damage in the sum of $50,000.00. That as a result of the injuries sustained at the time and place aforesaid Marguerite (and Roberta) Doheny was compelled to employ the services of a physician and obtain special hospital care and attention and become obligated for the payment of same to her further damage in the sum of $50.00.

That at the time of the grossly negligent and reckless operation of the automobile hereinabove referred to and the infliction of the injuries upon the said Marguerite (and Roberta) Doheny, causing her death, the said Marguerite Doheny was of the age of twenty years, in good health and was capable of earning and was earning the sum of approximately $60.00 per month. (And said Roberta Doheny was of the age of eighteen years, in good health and although she had not been employed in a gainful occupation for approximately three weeks she was capable of earning approximately $60.00 per month and at the time of her death had [177] arranged to resume employment the following month at a rate of compensation of $60.00 per month.)

By way of affirmative defenses to the allegations of plaintiff's complaint the defendants allege that if the said Marguerite (and Roberta) Doheny accompanied defendant Johnson and aforesaid Bardon in the automobile claimed by plaintiff that said Johnson and Bardon had not been instructed, directed or granted permission or authority by the

partnership or by John M. Coverdale personally to invite, request, permit or allow any person to ride in said automobile on said trip and particularly not to the said Marguerite (or Roberta) Doheny; and, that said E. O. Johnson and said George S. Bardon were without right, authority, permission or allowance from the partnership or from John M. Coverdale personally to permit or allow any person and particularly not the said Marguerite (or Roberta) Doheny to ride in said automobile at the time and place. And if the said Marguerite (or Roberta) Doheny did ride in said automobile as alleged by plaintiff she did so without the consent, permission, invitation or authority of the partnership or Coverdale personally and that they were invited or permitted to do so by defendant, Johnson, and said Bardon, each on his own behalf and outside the scope of authority given by defendant partnership and not in the transaction of the business of the partnership and that at said time said Johnson and said Bardon were not then acting as a partner, servant or agent of the partnership and were not acting in the course of employment; And that in so riding in said automobile Marguerite (nor Roberta) was not an invitee or guest and her death was not the result of any negligence or the result of any acts or omissions of the said partnership or of John M. Coverdale personally. [178]

These allegations of defendants' answers are denied by plaintiff.

No. 2.

The burden of proof is upon the plaintiff to establish the allegations of his complaint by a preponderance of the evidence.

The term "Preponderance of the evidence," as now and hereinafter used, means the greater weight of the evidence.

No. 3.

You are instructed that it is the law of Montana that:

Every person operating or driving a vehicle of any character on a public highway of this state shall drive the same in a careful and prudent manner, and at a rate of speed no greater than is reasonable and proper under the conditions existing at the point of operation, taking into account amount and character of traffic, condition of brakes, weight of vehicle, grade and width of highway, condition of surface, and freedom of obstruction to view ahead, and so as not to unduly or unreasonably endanger the life, limb, property, or other rights of any person entitled to the use of the street or highway.

No. 4.

You are instructed that ordinary negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done.

No. 5.

The proximate cause of an injury is that cause which in a natural and continuous sequence, unbroken by any new and independent cause, produces the injury, and without which it would not have [179] occurred.

No. 6

The plaintiff has the burden of establishing by a preponderance of the evidence that George S. Bardon, while co-partner E. O. Johnson was present in the automobile, operated the Ford V-8 Sedan automobile owned by E. O. Johnson, in a grossly negligent and reckless manner, while Marguerite (or Roberta) Doheny was a passenger therein, inflicting physical injuries upon the person of Marguerite (or Roberta) Doheny which caused her death; and that the grossly negligent and reckless operation of such automobile under the then existing circumstances and conditions directly and proximately caused the injuries and death of Marguerite (or Roberta) Doheny.

No. 7.

If you believe from the evidence that the manner in which George S. Bardon operated the Ford V-8 Sedan automobile directly and proximately caused the injuries to the person of and death of Marguerite (or Roberta) Doheny then in determining whether the manner of operation of the automobile by him constituted a grossly negligent and reckless operation you are instructed that if you believe

from the evidence that the conduct of George S. Bardon in operating said automobile under the then existing and surrounding circumstances and conditions amounted to something more than ordinary negligence, to-wit, the want of slight care, upon his part, then your verdict should be in favor of the plaintiff.

No. 8.

You are instructed that the law presumes that Marguerite [180] (or Roberta) Doheny was at all times exercising due care for her personal safety and this presumption has the force of evidence in the absence of countervailing evidence sufficient to overcome the presumption.

No. 9.

If you find in favor of the plaintiff and believe from the evidence that Marguerite (or Roberta) Doheny's earning capacity was destroyed as a result of the grossly negligent and reckless operation of the automobile by George Bardon then in determining the damages sustained by her as a result of loss of earning capacity you may consider her age, occupation, state of health, her ability to earn money, non-employment, increase or diminution in earning capacity as age advances, the circumstances that she may not have lived the period of time of her expectancy of life as shown by the mortality tables and that she might have lived a period of time beyond the period of her expectancy of life.

Annuity costs and mortality tables have been introduced in evidence in this case. Such tables are

not to be considered as absolute basis for your calculations but must be used by you as a guide only so far as the facts before you correspond to those from which such tables were computed.

In determining the amount of damages by reason of loss, if any, of earning capacity by Marguerite (or Roberta) Doheny, you may allow such sum as damages as would be required to purchase an annuity equal to the amount that Marguerite (or Roberta) Doheny would reasonably be expected to earn yearly during the period of expectancy of her life. [181]

No. 10.

If you find your verdict in favor of the plaintiff and against the defendants then it will be necessary for you to write into that verdict the amount of damages directly and proximately caused Marguerite (or Roberta) Doheny by reason of the grossly negligent and reckless operation of the automobile by George S. Bardon. In determining this amount you are limited to a sum of money which would have reasonably compensated Marguerite (or Roberta) Doheny for the pain and suffering of mind and body which the injuries caused (if any such pain and suffering were caused) between the time she was injured and the time she died if she survived the injuries for any appreciable length of time and to the further sum that would have compensated her for the impairment, if any, which was caused by the injuries, of her capacity to earn money in the future if she had not been injured,

together with such sum as is reasonable for medical treatment and nursing required to be rendered to said Marguerite (or Roberta) Doheny by reason of any injuries which she may have sustained as aforesaid.

The amount sued for and claimed in the complaint, to-wit, $50,050.00 must not be to you any criterion in determining the amount of your verdict, if you render any in favor of the plaintiff, but I charge you that in no event shall your verdict be in excess of the amount of $50,050.00.

No. 11.

You are instructed that it is the law of the State of Montana that:

Any person riding in a motor vehicle as a guest or by invitation and not for hire, assumes as between owner and guest the [182] ordinary negligence of the owner *of* operator of such motor vehicle.

No. 12.

You are instructed that it is not sufficient for the plaintiff to show that George S. Bardon was guilty of ordinary negligence, but the plaintiff must go further and show that said George S. Bardon operated the Ford automobile in a grossly negligent and reckless manner, and the mere fact itself that a collision occurred and that Marguerite (or Roberta) Doheny died, raises no presumption of such gross negligence and reckless operation.

No. 13.

You are instructed that in deciding whether your verdict in this case shall be for the plaintiff or the defendants, you shall be governed solely by the evidence given upon the stand and the law given you in the instructions and not by considerations of sympathy.

No. 14.

The jury is instructed that gross negligence and reckless operation is something more than ordinary negligence; it is the want of slight care.

No. 15.

You are instructed that the owner or operator of a motor vehicle is not liable for any damages or injuries to any passenger or person riding in said motor vehicle as a guest or by invitation and not for hire, unless damage or injury is caused directly and proximately by the grossly negligent and reckless operation by him of such motor vehicle, and you are further instructed in this [183] case that neither the defendant John M. Coverdale and the defendant Coverdale & Johnson, a co-partnership, is liable for damages or injuries to Marguerite (or Roberta) Doheny unless plaintiff proves by a preponderance of the evidence that such damage or injury was caused directly and proximately by the grossly negligent and reckless operation of the automobile by George S. Bardon.

No. 16.

You are instructed that in this case the defendants John M. Coverdale and Coverdale & Johnson,

a co-partnership, deny that E. O. Johnson and George S. Bardon were acting within the scope of the business of the partnership in inviting or permitting Marguerite (or Roberta) Doheny to ride in the automobile of E. O. Johnson on the night of December 10th, 1934, and you are instructed that unless you find from a preponderance of the evidence that the said E. O. Johnson and George S. Bardon were acting within the scope of the business of the partnership in inviting or permitting the said Marguerite (or Roberta) Doheny to ride in said automobile, then your verdict must be for the defendants John M. Coverdale and Coverdale & Johnson, a co-partnership.

No. 16 A.

You are further instructed that if the automobile involved in this action was, at the time of the infliction of the injuries upon Marguerite (or Roberta) Doheny being used for the business of the partnership and that the said Marguerite (or Roberta) Doheny was in said automobile either by invitation or acquiescence of co-partner E. O. Johnson and that the injuries inflicted at the time were the result of the grossly negligent and reckless [184] operation of said automobile as the proximate cause of said injuries, then your verdict should be for the plaintiff.

No. 17.

You are not at liberty to assume the existence of any state of facts unless there is evidence in the

case justifying the conclusion; nor can any member of the jury act on any knowledge he may have of the facts, or on any information he may have acquired from any source other than from the evidence adduced at the trial.

No. 18.

You are instructed that your power of judging of the effect of the evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence. You are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number or against a presumption or other evidence satisfying your minds.

No. 19.

A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty or integrity, or his motives, or by contradictory evidence, and the jury are the exclusive judges of his credibility.

No. 20.

You are instructed that a witness false in one part of his testimony is to be distrusted in other parts. [185]

No. 21.

The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason.

No. 22.

As the Court has instructed you, gentlemen of the jury, you are the exclusive judges of the credibility of the witnesses and of the weight and value to be given their testimony. In determining as to the credit you will give to a witness, and the weight and value you will attach to a witness' testimony, you have a right and you should take into consideration the conduct and appearance of the witness upon the stand; the interest of the witness, if any, in the result of the trial; the motives actuating the witness in testifying, if any; the witness' relation to, or feelings for or against, either party, if any; the probability or improbability of the witness' statements; the opportunity the witness had to observe and to be informed as to matters respecting which such witness gives testimony; and the inclination of the witness to speak truthfully or otherwise as to matters within the knowledge of such witness. All these matters being taken into account with all the other facts and circumstances given in evidence, it is your province to give to each witness such credit, and the testimony of each witness such value and weight, as you deem proper.

No. 23.

In determining what are the facts in this case and what verdict, if any, you should return, you

will take into consideration only the testimony of the witnesses upon the witness stand in this case and such documentary evidence and exhibits as have [186] been admitted.

You must not allow yourselves to consider or be in any manner influenced by anything which you have seen, heard or read outside of the evidence and exhibits in this case.

Your verdict, if you arrive at one, must be based solely upon the evidence and instructions of the Court presented and read to you in the course of the trial.

By no remark made by the Court during the trial, nor by these instructions or otherwise, does the Court or did the Court express any opinion as to the facts in the case. It is for you and not the Court to determine what the facts are.

You should not give any weight to statements of counsel heretofore or that may hereafter be made to you which are not supported by the evidence presented to you and by the instructions of the Court. Counsel are, however, privileged to argue and comment upon the law as given in these instructions, in their arguments to you.

No. 24.

You should consider these instructions as a whole. You have no right to consider any part or parts of them to the exclusion of other portions thereof.

No. 25.

When you retire to consider of your verdict you should select one of your number as Foreman whose duty it will be to sign any verdict you may make.

No. 26.

Blank forms of verdicts will be furnished you for your [187] convenience, one of which you will find suitable for such verdict as you may make.

No. 27.

It requires the concurrence of at least eight of your number to make a verdict.

Dated this 2nd day of May, 1936.

W. H. MEIGS,
Judge.

OBJECTION INTERPOSED DURING ARGUMENT OF COUNSEL

The Court: Let the record show, Mr. Reporter, that while counsel for defendant was arguing the case to the jury that he commented upon the fact that the verdict, if found against the defendants, would fall upon Mr. Coverdale, with the implication that it might break him or wreck him financially, with other similar comment. That thereafter, when counsel for plaintiff came to make reply thereto, he said "Why didn't counsel for defendants ask Mr. Coverdale as to his wealth, so that we would have had opportunity to cross examine him as to whether he was worth a million or more

millions or any extent of his wealth, or as to whether the firm of Coverdale & Johnson had liability insurance. Thereupon counsel for defendant moved for a mistrial, and stated "I will say to Mr. McCabe, we have no public liability insurance", and that the Court thereupon directed that he would let the case proceed, and that that matter could be taken up later. Thereupon counsel for defendant requested the Court to admonish the jury relative thereto, and the Court had said, when he thought to call in the Court Reporter, and now repeats: "Gentlemen of the Jury: As forcefully as I can, as earnestly as I can speak, as [188] clear as your minds are now as intelligent gentlemen and men of the community and experienced in life, I admonish that you should erase that remark made by counsel for plaintiff as completely from your mind as you did when in school days you would take your fingers or a piece of sponge and wipe some lettering on your slate, and wipe it out entirely.

Mr. McCabe: I would likewise ask the Court to admonish the jury as to statements made by counsel for defendants and as to Mr. Coverdale's financial responsibility, and his statements as to facts not in evidence, and not to be influenced by them.

The Court: That also the jury will take into consideration. There is an instruction, Gentlemen of the Jury, given you jurors, that this case is not to be determined on sympathy. That means sympathy neither for money or lack of it, neither for parental affection or lack of it.

Mr. Toole: There is one other matter, your Honor, just for a moment: Immediately after I moved for a mistrial the Court suggested that that could be taken up later, and it was after that that I asked the Court to admonish the jury.

The Court: I think I designated that to the Reporter.

Mr. Toole: I didn't know if the record was exactly clear on that.

Thereafter, the jury having retired to consider on a verdict:

Mr. Toole: I would like a ruling on that motion for a mistrial.

The Court: Well, I admonished the jury, and deny the motion. [189]

And thereafter, the jury having retired to consider of their verdict, returned a verdict in favor of the plaintiff and against the defendants in each of said causes, and assessed plaintiff's damages in the sum of $5,000.00 in each of said causes.

And thereupon counsel for defendants, in each of said causes, requested of the Court and was granted sixty days in addition to the statutory time allowed by law in which to file Bill of Exceptions herein.

And thereafter and within ten days from the receipt by defendants of notice of entry of judgment, the defendants filed their notice of intention to move for a new trial in each of said causes, which said notice is as follows:

[Title of Court and Cause.]

NOTICE OF INTENTION TO MOVE FOR A NEW TRIAL

To Ethel M. Doheny, as administratrix of the estate of Marguerite Doheny, deceased, (and of the Estate of Roberta Doheny, deceased), as plaintiff in the above entitled action and to Cleve Hall and E. J. McCabe, her Attorneys:

You and each of you will please take notice that John M. Coverdale and Coverdale and Johnson, a co-partnership, defendants in the above entitled action, do hereby give notice of their intention to move for a new trial and a re-examination of the issues in the above entitled action. You will please further take notice that said defendants being the parties aggrieved intend to move to have the verdict vacated for the following causes materially effecting the substantial rights of said defendants:

I.

Irregularity in the proceedings of the adverse party by which the said defendants were prevented from having a fair trial. [190]

II.

Insufficiency of the evidence to justify the verdict and that the verdict is against the law.

III.

Errors in law occurring at the trial and excepted to by the defendants.

You will please further take notice that the said motion will be based upon the minutes of the Court and upon the record of the trial of said action.

Dated this 3rd day of May, 1936, at Helena, Montana.

HOWARD TOOLE,
W. T. BOONE,
Attorneys for defendants, John M. Coverdale and Coverdale and Johnson.

That thereafter said defendants' motion for a new trial having duly come on for hearing on the 11th day of May, 1936, the court upon due consideration, thereupon, on the said 11th day of May, 1936, denied each of said motions of said defendants for a new trial.

And now, within the time allowed by law and that granted by the Court, the defendants present the foregoing as their Bill of Exceptions in each of said causes, and pray that the same may be signed, settled and allowed.

Dated this 29th day of June, 1936.

HOWARD TOOLE,
W. T. BOONE,
Attorneys for defendants, John M. Coverdale and Coverdale and Johnson.

Due service of the foregoing proposed Bill of Exceptions acknowledged and receipt of a copy thereof admitted this 29th day of June, 1936.

HALL & McCABE
Attorneys for Plaintiff.

[Endorsed]: Filed June 29, 1936. George Harper, Court Clerk. J. E. Hilgard, Deputy. Filed after settlement July 11, 1936. George Harper, Clerk. By J. E. Hilgard, Deputy Clerk. [191]

[Title of State Court and Cause.]

JUDGE'S CERTIFICATE

A stipulation having been filed herein between the plaintiff Ethel M. Doheny and defendants John M. Coverdale and Coverdale & Johnson, a co-partnership, amending the proposed bill of exceptions filed herein by said defendants, and

It appearing that said proposed bill of exceptions having been duly and regularly served and presented for settlement to the undersigned, the judge who tried said causes, as amended by said stipulation,

Now, Therefore, This is to certify that the said foregoing proposed bill of exceptions as amended by said stipulation is full, true and correct and is hereby settled, allowed and assigned as a full, true and correct bill of exceptions of the proceedings

had and taken at the trial of said causes, and the same is ordered filed this 11th day of July, 1936.

W. H. MEIGS,
Judge. [192]

In the District Court of the United States for the District of Montana, Great Falls Division.

No. 69.

ETHEL M. DOHENY, as Administratrix of the Estate of Roberta Doheny, Deceased,
Plaintiff and Appellee,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation,
Defendant and Appellant,
and

No. 70.

ETHEL M. DOHENY, as Administratrix of the Estate of Marguerite Doheny, Deceased,
Plaintiff and Appellee,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation,
Defendant and Appellant.

ORDER FOR SUPPLEMENTAL RECORD ON APPEAL

It having been made to appear to the Court that in the consolidated record on appeal to the Circuit Court of Appeals for the Ninth Circuit in the above entitled causes there has been omitted therefrom by error and accident certain evidence material to the above named plaintiff and appellee consisting of certain written exhibits, hereinafter specified, and which were offered and received in evidence at the trial of above entitled causes on behalf of said plaintiff and appellee:

Now therefore on motion of said plaintiff and appellee it is ordered that said plaintiff and appellee may have certified and transmitted by the Clerk of this District Court to the United States Circuit Court of Appeals for the Ninth Circuit a supplemental consolidated record on appeal in the above entitled actions [193] containing copies of plaintiff's Exhibits numbered 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24 and 25, and a copy of this order; and

It is further ordered that the Clerk of this District Court upon application of said plaintiff and appellee therefor, shall certify and transmit to the United States Circuit Court of Appeals for the Ninth Circuit a supplemental consolidated record on appeal in the above actions and containing true copies of the said plaintiff's exhibits hereinabove specified, and a copy of this order.

Done this 15th day of March, 1941.

CHARLES N. PRAY
Judge.

[Endorsed]: Filed and Entered March 15, 1941. C. R. Garlow, Clerk. [194]

CLERK'S CERTIFICATE TO SUPPLEMENTAL TRANSCRIPT OF RECORD ON APPEAL.

United States of America,
District of Montana—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify that the foregoing volume consisting of 195 pages, numbered consecutively from 1 to 195, inclusive, and consisting of true and correct copies of Plaintiff's Exhibits numbered 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24 and 25, and Order for Supplemental Record on Appeal, filed in cases:

No. 69,

Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased,

vs.

United States Fidelity and Guaranty Company, a Corporation;

and

No. 70,

Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased,

vs.

United States Fidelity and Guaranty Company, a Corporation;

constitutes the Supplemental Record on Appeal in said cases, ordered transmitted to the United States Circuit Court of Appeals for the Ninth Circuit by order of the United States District Court for the District of Montana, filed and entered March 15, 1941 at Great Falls, Montana.

I further certify that the cost of the within Supplemental Record on Appeal, amounting to Thirty-one and 50/100ths Dollars, ($31.50), has been paid by the Appellees.

Witness my hand and the seal of the United States District Court for the District of Montana, at Great Falls, Montana, this 21st day of March A. D. 1941.

[Seal] C. R. GARLOW,
Clerk as aforesaid.

By C. G. KEGEL,
Deputy Clerk. [195]

[Endorsed]: No. 9668. In the United States Circuit Court of Appeals for the Ninth Circuit. United States Fidelity and Guaranty Company, a corporation, Appellant, vs. Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, Appellee, and United States Fidelity and Guaranty Company, a corporation, Appellant, vs. Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, Appellee. Supplemental Transcript of Record on. Upon appeals from the District Court of the United States for the District of Montana.

Filed Mar. 24, 1941.

PAUL P. O'BRIEN.
Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit.

No. 9668.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Appellant,

vs.

ETHEL M. DOHENY, as administratrix of the Estate of Roberta Doheny, deceased,

Appellee,

and

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Appellant,

vs.

ETHEL M. DOHENY, as administratrix of the Estate of Marguerite Doheny, deceased,

Appellee.

PRAECIPE

To: Paul P. O'Brien, Esq., Clerk of the above Court:

Please have printed, in its entirety, and file the Supplemental Record on Appeal heretofore certified by the Clerk of the District Court of the United States for the District of Montana and transmitted to the above appellate court in the above entitled consolidated causes on appeal.

Dated this 22nd day of March, 1941.

E. J. McCABE
Attorney for Appellee,
Great Falls, Montana.

[Endorsed]: Filed Mar. 24, 1941. Paul P. O'Brien, Clerk.

No. 9668

United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Appellant,

vs.

ETHEL M. DOHENY, as Administratrix of the Estate of Roberta Doheny, Deceased,

Appellee.

and

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Appellant,

vs.

ETHEL M. DOHENY, as Administratrix of the Estate of Marguerite Doheny, Deceased,

Appellee.

Brief of Appellant

Howard Toole
W. T. Boone
Attorneys for Appellant

Upon Appeal from the District Court of the United States for the District of Montana.

United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Appellant,

vs.

ETHEL M. DOHENY, as Administratrix of the Estate of Roberta Doheny, Deceased,

Appellee.

and

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Appellant,

vs.

ETHEL M. DOHENY, as Administratrix of the Estate of Marguerite Doheny, Deceased,

Appellee.

Brief of Appellant

Howard Toole
W. T. Boone
Attorneys for Appellant

Upon Appeal from the District Court of the United States for the District of Montana.

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JURISDICTION

This is a consolidated appeal from two judgments entered in the District Court of the United States for the District of Montana, Great Falls Division, in two cases wherein the appellee, Ethel M. Doheny, as Administratrix, and a resident and citizen of the State of Montana, was plaintiff, and the appellant, United State Fidelity and Guaranty Company, a corporation, and a resident and citizen of the State Maryland, was defendant (R. 16, 39).

In each of the two cases the appellee seeks to recover from the appellant the sum of $5,116.89 which amount represents the amount of each of two judgments made and entered in her favor in the District Court of the Eighth Judicial District of the State of Montana, in and for Cascade County, in two actions entitled

> "Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, deceased, plaintiff, vs. John M. Coverdale and E. O. Johnson, co-partners doing business under the firm, name and style of Coverdale & Johnson, defendants, (R. 73) and
>
> "Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, deceased, plaintiff, vs. John M. Coverdale and E. O. Johnson, co-partners doing business under the firm, name and style of Coverdale & Johnson, defendants, (R. 75)."

The two causes, involved in this appeal, were originally filed in the District Court of the Eighth Judicial District of the State of Montana, in and for Cascade County, (R. 3, 26) and on petition and order were removed for trial to the United States District Court in

and for the District of Montana, Great Falls Division (R. 15, 24, 38, 47). The two cases were consolidated by the United States District Court for trial and were heard together as the pleadings were alike, the facts identical and the law applicable thereto, the same (R. 64). For those reasons the causes are here presented in a consolidated appeal.

The jurisdiction of the District Court of the United States is found in Section 41, Title 28, United States Codes Annotated, Section (1) (b); (Judicial Code, Section 24, as amended) wherein the United States District Court is given jurisdiction over causes between citizens of different states, where the amount in controversy exceeds the sum of $3000.00, exclusive of interest and costs.

The appellate jurisdiction of the United States Circuit Court of Appeals is found in Section 225, Title 28, United States Codes Annotated (first paragraph) Judicial Code, Section 128, as amended) wherein the Circuit Court of Appeals is given jurisdiction in all cases save those in which there is a direct appeal to the Supreme Court of the United States. No such direct appeal to the Supreme Court is permissable in these cases.

STATEMENT OF THE CASE

On December 12, 1934, Marguerite Doheny and Roberta Doheny, daughters of the appellee, while riding as guests in an automobile owned by E. O. Johnson, one of the members of the co-partnership of Coverdale

& Johnson, received personal injuries which caused their deaths as a result of an automobile accident which occurred at Simms, in Cascade County, Montana. Thereafter two actions were commenced by the appellee as the Administratrix of the Estate of Marguerite Doheny, Deceased, and Roberta Doheny, deceased, respectively, in the state court against Coverdale & Johnson, a co-partnership, in which actions appellee sought damages for personal injuries to and the death of Marguerite and Roberta Doheny. The trial of these two cases resulted in a verdict of $5000.00 in each case in favor of appellee and against Coverdale & Johnson (R. 73, 75). Both cases were appealed by Coverdale & Johnson to the Supreme Court of the State of Montana and both judgments were by the Supreme Court affirmed (R. 69). Execution was taken out against Coverdale & Johnson in each of the cases and was returned wholly unsatisfied (R. 72).

The two cases involved in this appeal are actions brought by appellee against the appellant, United States Fidelity and Guaranty Company, to recover the amount of each of the judgments, together with interest and costs, obtained by her in the state court against Coverdale & Johnson (R. 3 to 10 and 27 to 33). Appellee seeks in these actions to impose liability upon the appellant for the unsatisfied judgments against Coverdale & Johnson by reason of the fact that appellant had written a surety bond for and issued a Contractor's Public Liability Policy to the co-partnership in connec-

tion with the latter's written contract with the Montana State Highway Commission, which agreement was entered into on September 21, 1934 (R. 4 to 7 and 28 to 30). The contract provided for the construction by the contractor (Coverdale & Johnson) of certain improvements, consisting of one concrete and five treated timber pile bridges and stock passes on the Augusta-Sun River Road in Lewis and Clark County, Montana (R. 89).

As a condition precedent to the complete execution of this contract, the contractor was required by the terms of the contract to furnish a good and sufficient surety bond to be conditioned upon the faithful performance by it of the covenants and agreements contained in the contract (R. 98). The "contract bond" was executed on September 21, 1934, in favor of the State of Montana by Coverdale & Johnson, as principal, and the appellant, as surety (R. 100). The condition of the bond is as follows: (R. 101):

> "Now, Therefore, The Condition of this obligation is such that if the above bonded 'Principal' as Contractor shall in all respects faithfully perform all of the provisions of said contract, and his, their or its obligations thereunder including the specifications therein referred to and made part thereof and such alterations as may be made in said specifications as therein provided for, and shall well and truly, and in a manner satisfactory to the State Highway Commission, complete the work contracted for, and shall save harmless the State of Montana, from any expense incurred through the failure of said Contractor to complete the work as

specified, or from any damages growing out of the carelessness of said Contractor or his, their, or its servants, or from any liability for payment of wages due or material furnished said Contractor, and shall well and truly pay all laborers, mechanics, subcontractors and material men who perform work or furnish material under such contract, and all persons who shall supply him or the subcontractor with provisions, provender and supplies for the carrying on of the work, and also shall save and keep harmless the said State of Montana against and from all losses to it from any cause whatever including patent, trade-mark and copyright infringements, in the manner of constructing said section of work, then this obligation to be void or otherwise to be and remain in full force and virtue."

Section 7.11 of the contract specifications (R. 86) provided that "the contractor shall carry public liability insurance to indemnify the public for injuries or damages sustained by reason of the carrying on the work" and "shall submit adequate evidence to the Commission that he has taken out this insurance." At the time the contract was sent to Coverdale & Johnson, a letter was addressed by the Commission to the contractor (R. 110) which, among other things, directed the latter's attention to the above provision of the contract and as to the submission of "adequate evidence" stated "preferably, this information should be conveyed in the form of a letter to this Department from the insurance agent who furnishes you the policy."

On October 1, 1934 (ten days after the execution and delivery of the contract), a Contractor's Public

Liability Policy of insurance was written by the appellant through agent Bowman at Anaconda, Montana, to the contractor (R. 133 to 163) and on the same date the appellant by letter (R. 113) advised the Commission "we have issued Contractor's Public Liability Policy PC-19715 for this assured, with Public Liability limits Ten Thousand and Twenty Thousand and Property Damage One Thousand. This policy is written for one year from October 1st, 1934."

The Montana State Highway Commission, at least since 1929, has never prepared a form of Public Liability Insurance Policy for use by contractors and has never prescribed the terms of a policy such as was required by Section 7.11 of the contract specifications, and has never required contractors, including Coverdale & Johnson, to deliver the original or a copy of the policy of insurance to it (R. 115, 116).

The Contractor's Public Liability Policy so issued to the contractor by the appellant contains the following pertinent provisions:

> "*The Insuring Agreement.*
>
> "I. To settle and/or defend in the manner hereinafter set forth all claims resulting from liability imposed upon the Assured by law *for damages on account of bodily injuries, including death* at any time resulting therefrom, accidentally suffered or alleged to have been suffered within the policy period defined in Statement 2 *by any person or persons other than employees of the Assured, by reason of and during the progress of the work described in Statement 4 at the places named therein*

and elsewhere, if caused by employees of the Assured engaged as such in said operations at said places; but who are required in the discharge of their duties to be from time to time at other places, *except driving or using any vehicle or automobile or any draught animal or loading or unloading any such vehicle." (R. 133)*

"Exclusions.

"Condition A.

"This policy shall not cover loss from liability for, or any suit based on, injuries or death:

. . . .

"(3) *Caused by* any draught or driving animal or vehicle or *automobile owned or used by the Assured or any person employed by the Assured while engaged in the maintenance or use of same elsewhere* than upon the insured premises." (R. 136)

Endorsement entitled "Contractor's Public Liability Endorsement," attached to the policy extends the coverage to claims arising in connection with:

"1. Self-propelled contractor's equipment and appliances (except motorcycles, tractors, and automobiles, whether with or without mounted equipment or machinery) with or without towed equipment, while being moved under their own power between places covered by the Policy where the Assured is carrying on his operations;

"2. Road graders and road scrapers while being drawn by draught animals between places covered by the Policy where the Assured is carrying on his operations." (R. 154)

This endorsement also changes exclusion (3) of Condition A of the policy to read as follows (R. 154):

"This policy shall not cover loss from liability

for, or any suit based on, injuries or death:

. . . .

"Caused directly or indirectly by any draught or driving animal, any automboile, trailer, tractor, motorcycle or other vehicle (including the loading and unloading thereof) elsewhere than at the immediate places covered by the Policy where the Assured is carrying on his operations."

The policy, by endorsement No. 8, was extended to cover operations described in the schedule of operations attached to the policy as applicable to that certain work designated as NRH-176 "E" Unit No. 2, being concrete and timber pile bridges on Augusta-Sun River Road, Lewis and Clark County, Montana. In the schedule referred to, the work is referred to as "being construction of concrete and timber pile bridges, Augusta-Sun River Road, Lewis and Clark County, Montana, . . . " (R 161)

The concrete and treated timber pile bridges, covered by the Highway Commission contract, were located on what is called the Augusta-Sun River Road in Lewis and Clark County, Montana. (R. 89) The automobile accident, reference to which has been previously made, occurred in the town of Simms in Cascade County, Montana. Of the bridges covered by the contract, the nearest one to the point of the accident was 12.3 miles. The other bridges were scattered from that 12-mile point to 22 miles distant from the point of the accident. There were five bridges under the Highway Commission contract and only one of the five bridges was un-

completed when the accident occurred, that being the one 22 miles distant from Simms, where the automobile accident took place. At the time of the accident the contractor was not working on that bridge, but was in fact working on bridges under another Highway Commission contract on what is known as the Augusta-Choteau Road at a point 28 miles from the location of the accident. (R. 131, 132, 173)

QUESTIONS PRESENTED

The questions presented in this consolidated appeal may be briefly stated as follows:

First. Do the unsatisfied state court judgments arising out of the automobile accident, under the pleadings and proof, come within the terms, provisions, insuring agreement and coverage of the Contractor's Public Liability Policy (Defendant's Exhibit 27) issued by the appellant to the contractor, Coverdale & Johnson?

Second. Whether there is any liability upon appellant under the contract performance bond (plaintiff's exhibit No. 2 on deposition) executed by appellant as surety, for the unsatisfied state court judgments against Coverdale & Johnson?

Third. Whether, in the interpretation of the said Contractor's Public Liability Policy, it was proper to resort to extrinsic evidence, such as the contract between the contractor and the State Highway Commission, and the contract performance bond to the end of

holding the exclusion provisions of the said Contractor's Public Liability Policy inoperative, when (a) the Contractor's Public Liability Policy is admittedly a clear, concise and unambiguous contract and (b) when the contract between the contractor and the State Highway Commission, and the contract performance bond, and the Contractor's Public Liability Policy are not contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction?

Fourth. When there is no pleading seeking a reformation of the policy and no pleading or evidence of mistake, fraud or ambiguity in connection therewith, was it proper for the trial court to reform the policy?

SPECIFICATIONS OF ERROR

1. Because there was no sufficient evidence in the record, the trial court erred in making its finding of fact No. V in each of the cases as follows (R. 188, 196):

> "That on the 12th day of December, 1934, and while carrying on the work mentioned and described in the aforesaid written agreement between the said co-partners and the State of Montana the aforesaid co-partners operated a certain automobile in such a grossly negligent and reckless manner as to injure and kill one Roberta Doheny (Marguerite Doheny) and that at the time the said Roberta Doheny (Marguerite Doheny) was a member of the public and said automobile was then and there being used in carrying on the work under aforesaid agreement . . ."

2. Because the Contractor's Public Liability Policy (Defendant's Exhibit 27) was a clear, concise and unambiguous contract of insurance and because the instruments with which it was construed, namely, the contract between Coverdale & Johnson and the Montana State Highway Commission, and the contract performance bond (Plaintiff's Exhibits 1 and 2 on deposition), were not contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, the trial court erred in making its finding of fact No. VIII in each of the cases, as follows (R. 190, 198):

> "The defendant United States Fidelity and Guaranty Company executed and delivered to the said co-partners a written public liability insurance policy bearing date October 1, 1934, and which was introduced in evidence by the defendant corporation and received in evidence as defendant's Exhibit 27 and which policy was written and issued by defendant as a purported compliance with the requirements of the written agreement with the State Highway Commission of Montana. The policy of insurance so written and delivered contains exclusion provisions which are antagonistic and contrary to the requirements of the aforesaid agreement with the State Highway Commission of the State of Montana, and such exclusion provisions were and are inoperative to defeat recovery in this action."

3. Because there is no pleading seeking a reformation of the Contractor's Public Liability Policy (Defendant's Exhibit 27), and because there is no pleading or proof of mistake, fraud or ambiguity, the trial

court erred in making a reformation of said policy and in holding, in the opinion of the court, as follows (R. 184):

> "Under the construction given the policy reading it as one with the contract and bond, together with the evidence, reformation seems unnecessary, since it would mean the same in any event."

4. The trial court erred in admitting Plaintiff's Exhibit No. 1 on deposition (R. 81-99) said exhibit No. 1 on deposition being the contract between the State Highway Commission and Coverdale & Johnson for the construction of certain highway bridges, over the objection of the appellant, as follows:

> "Mr. McCabe: Offer in evidence plaintiff's exhibit 1 as a part of the testimony of this witness.
>
> "Mr. Boone: To which the defendant objects on the ground that the instrument has not been properly identified; further as incompetent, irrelevant and immaterial, having no bearing upon the issues in this case. And further objection that the offer of the exhibit is an attempt on the part of the plaintiff to vary the terms of a certain policy of insurance, which is the subject of this action.
>
> "The Court: Are these standard specifications, and do they relate particularly to this contract?
>
> "Mr. McCabe: Yes.
>
> "The Court: Overrule the objection."

5. The trial court erred in admitting Plaintiff's Exhibit No. 2 on deposition (R. 99-102), said exhibit being the contract performance bond furnished by appellant

to Coverdale & Johnson to guarantee the faithful performance of the contract for the construction of the highway bridges, over the objection of the defendant, as follows:

> "The Witness: The Contract Bond, marked as plaintiff's exhibit 2, is the bond I have heretofore testified to as being annexed to the document marked plaintiff's exhibit 1.
>
> "Mr. McCabe: We offer plaintiff's exhibits 1 and 2 as a part of the testimony of this witness.
>
> "Mr. Boone: To which the defendant objects in that the plaintiff's exhibit has not been properly authenticated and on the further ground that the exhibit is incompetent, irrelevant and immaterial, and has no bearing on the issues in this case; on the further ground it is an attempt on the part of the plaintiff to vary the terms of a certain insurance policy executed to John M. Coverdale and E. O. Johnson, which insurance policy is the subject of this action.
>
> "The Court: Overrule the objection."

6. The trial court erred in admitting Plaintiff's Exhibit No. 3 on deposition (R. 110, 111), said exhibit being a letter from the State Highway Commission to the contractor wherein reference is made to the contract (Plaintiff's Exhibit 1 on deposition), the performance bond (Plaintiff's Exhibit 2 on deposition), and also referring to the provision in the contract relative to liability insurance, over the objection of the appellant, as follows:

> "Mr. McCabe: Plaintiff's exhibit No. 3 is offered in evidence.

"Mr. Boone: To which the defendant objects on the ground that it is incompetent, irrelevant and immaterial; that the exhibit constitutes a self-serving declaration and on the further ground that no communications, such as plaintiff's exhibit 3, between State Highway Commission and Coverdale & Johnson are binding upon the defendant, and upon the further ground no proper foundation has been laid for the introduction of the exhibit.

"The Court: Overrule the objection."

7. The trial court erred in admitting Plaintiff's Exhibit No. 4 on deposition (R. 113, 114), said exhibit being a letter from appellant to the State Highway Commission referring to the Contractor's Public Liability Policy (Defendant's Exhibit No. 27), over the objection of appellant, as follows:

"Mr. McCabe: Plaintiff's exhibit 4 is offered in evidence.

"Mr. Boone: This is objected to on the ground the instrument has not been properly authenticated; on the further ground no proper foundation has been laid for the admission of the exhibit in evidence and on the further ground it is incompetent, irrelevant and immaterial, not serving or having any bearing on the issues in this case.

"The Court: Objection overruled."

8. The trial court erred in making its conclusion of law No. 1 in each of the cases, as follows: (R. 192, 199)

"That the plaintiff Ethel M. Doheny, as administratrix of the estate of Roberta Doheny, (Marguerite Doheny) deceased, is entitled to the judgment of the above entitled Court in the above en-

titled action in her favor and against the defendant United States Fidelity and Guaranty Company in the sum of Five Thousand One Hundred Sixteen Dollars and Eighty-nine Cents ($5,116.89), together with interest on said sum from May 4, 1936 until paid at the rate of six per centum (6%) per annum, and plaintiff's costs incurred in said action."

9. The trial court erred in denying the appellant's motion to dismiss the complaint in each of the cases, said motion being made upon the ground that the complaint fails to state a claim upon which relief can be granted. (R. 50, 51)

10. The trial court erred in denying, in each of the cases, the appellant's motion to strike a certain part of paragraph III of the complaint, relating to the contract performance bond, said motion being upon the ground that said part of paragraph III was redundant, immaterial, impertinent and surplusage. (R. 52, 53)

11. The trial court erred in entering judgment in favor of the plaintiff and appellee and against the defendant and appellant in each of the cases (R. 200, 202)

ARGUMENT

A. Summary.

Admittedly the Contractor's Public Liability Policy involved in these cases is a clear and unambiguous contract of insurance. That fact was recognized by the trial court in its opinion and no issue to the contrary was raised in the pleadings by appellee. The trial

court also recognized, and we believe the appellee concedes, that if the exclusion provisions of the policy are operative, then the automobile accident and the resulting unsatisfied state court judgments against the insured contractor fall within the exclusions and no recovery under the policy can be had. (R. 181, 182, 184.) The policy exclusions very specifically provide that (R. 154, 155).

> "This policy shall not cover loss from liability for, or any suit based on, injuries or death: . . . .
> "Caused directly or indirectly by any . . . . . automobile . . . . . elsewhere than at the immediate places covered by the policy where the assured is carrying on his operations."

The operations referred to in the policy were the five concrete and treated timber pile bridges located from 12 to 22 miles away from where the automobile accident resulting in the deaths of Marguerite and Roberta Doheny occurred. (R. 131).

The appellant contends that the appelle's proof in these cases is insufficient to bring the unsatisfied state court judgments within the terms and provisions of the Contractor's Public Liability Policy.

It is impossible to ascertain from the opinion of the trial court and from its findings of fact and conclusions of law on what basis liability was imposed upon appellant; that is, whether the liability decreed was upon the basis of appellant having executed the surety bond to the State of Montana on behalf of the contractor, or

whether liability was predicated upon the Contractor's Public Liability Policy, the exclusion provisions of same being held inoperative, when the policy was construed together with the Highway Commission contract and the contract performance bond.

The appellant contends that there is no independent liability upon it for the unsatisfied state court judgments by having executed the contract performance bond, inasmuch as the bond was a statutory bond which, viewed in the light of its terms and conditions and the terms and conditions of the highway contract, did not require either the contractor or the surety to pay for any damages suffered by members of the public through the contractor's negligence.

If, on the other hand, liability was decreed upon the policy after being construed together with the highway contract and the contract performance bond, the appellant contends that it was improper for the trial court to construe the three instruments together because they were not between the same parties, relating to the same matters, and made as parts of substantially one transaction.

Furthermore the appellant contends that there being no pleading of fraud, or mistake, or ambiguity and no proof of such, the trial court nevertheless in effect reformed the Contractor's Public Liability Policy so as to delete therefrom the exclusion provisions within which the accident and the resulting unsatisfied state court judgments properly fell.

1. The Contract Performance Bond.

In this state, by Section 5668.41, Revised Codes of Montana, 1935, any public body or commission in contracting with any person or corporation to do any work for the state shall require that person or corporation to execute and deliver a good and sufficient surety bond "conditioned that such corporation, person or persons shall faithfully perform all of the provisions of such contract, and pay all laborers, mechanics, subcontractors and material men, and all persons who shall supply such corporation, person or persons, or subcontractors with provisions, provender, material or supplies for the carrying on of such work." Thus the contract performance bond involved in these cases is clearly a statutory bond.

The highway construction contract and the performance bond were both executed on September 21, 1934, (R. 89, 100) and as is stated in the formal contract itself the contractor was required to furnish the surety bond as "a condition precedent to the complete execution of this contract." (R. 98). There is no statute in Montana requiring liability insurance on public works nor does the statute requiring the performance bond in such cases make any mention of liability insurance. It is evident from the fact of the public liability policy having been executed ten days after the contract bond, and from the very terms of the contract itself, that the requirement that public liability insurance be

obtained by the contractor was not a condition precedent to the execution of the contract.

It may be argued by the appellee that by reason of the provision (R. 101) in the contract bond by Coverdale & Johnson and appellant to the State of Montana "that the principal would 'in all respects faithfully perform all of the provisions of said contract and his, their or its obligations thereto, including the specifications therein referred to and made a part thereof,' " the appellant, as surety, became obligated co-extensively with the contractor to comply with the provisions of specification 7.11 of the contract (R. 86) to the effect that "the contractor shall carry public liability insurance to indemnify the public for injuries or damages sustained by reason of the carrying on of the work."

The Montana Supreme Court expressly adopted, in the case of *Gary Hay & Grain Company vs. Carlson,* 79 Mont. 111 ,123; 255 Pac. 722, 725, the following general rule of suretyship:

> "The obligation of the surety is . . . . . co-extensive with and measured by the promises of the principal (the contractor) to the obligee (the State) appearing in the contract, provided proper expressions are used in the bond, and the surety by the bond binds itself only to the performance of those acts which the principal promises to perform as a part of his contract."

See also *Federal Surety Company vs. Basin. Construction Company,* 91 Mont. 114, 126; 5 Pac. (2d) 775.

It must be born in mind that the construction con-

tract in this case does not bind the contractor Coverdale & Johnson to "pay" for any injuries sustained through its negligence. Consequently, the appellant surety cannot be held bound to pay for such injuries since under the above cited cases the surety's obligation is coextensive with and measured by the promises of the principal to the obligee appearing in the contract and the surety by the performance bond binds itself only to the performance of those acts which the principal promises to perform as a part of his contract.

Marguerite and Roberta Doheny were not parties to the construction agreement nor were the highway contract and performance bond executed for their benefit. They were strangers to both the highway agreement and the performance bond and even though the contract and bond contain some reference to the class to which they belonged, they cannot recover from the appellant as surety for the contractor's failure to discharge a duty, here to provide liability insurance in the language of the highway agreement, because there is no specific promise on the part of the surety in the bond to pay members of that class for personal injuries.

This principle was very clearly established by *National Surety Company of New York vs. Ulmen,* 68 Fed. (2d) 330, (certiorari denied 78 L. Ed. 1479) which was a decision from the Circuit Court of Appeals, Ninth Circuit, upon review of a decision of the United States District Court for the District of Montana. In that case George Ulmen, the plaintiff, had previously com-

menced an action in the state court of Montana against R. A. Schwieger, a contractor, to recover damages for personal injuries sustained by reason of the contractor's negligence in failing to provide necessary barricades, lights and warnings, during the construction of a project under contract with the State Highway Commission of the State of Montana. He recovered judgment in the state court for $10,000.00 and then commenced this action against the National Surety Company of New York, who was the contractor's surety under the construction contract, and the plaintiff contended that by reason of the specifications in the contract which require the contractor to provide necessary barricades, lights, warnings, danger signals, etc., and by reason of the provision in the bond executed by the defendant "the condition of this obligation is such that if the bounden 'principal' as contractor shall in all respects comply with the terms of the contract," the defendant was obligated to pay the judgment recovered by Ulmen in the state court. The bond in the Ulmen case is identical with the bond involved in these cases.

The Circuit Court held that the defendant surety was not liable to pay the unsatisfied judgment against the contractor basing its decision on the ground that the surety bond, and the contract, contained no provision for payment, either by the contractor or his surety for any damages suffered by members of the public through the contractor's failure to erect and maintain proper signs. The Montana decisions are reviewed at length

in the court's decision, and the holding of the court is as follows:

> *"In view of the foregoing decisions of the Supreme Court of Montana, it is our view that, in that state, a third person who is a stranger to a contract or a bond thereunder, cannot recover from the surety even when the contract and bond, as here, contain some reference to him or to the class to which he belongs, unless there is a specific promise to pay such third person or such class, contained in the contract and bond. The mere statement of a duty to be discharged by the contractor, which may incidentally benefit a third party or class to which the latter belongs, without more, does not make the surety liable to such third person for the contractor's failure to discharge that duty."*

The status of the Doheny girls as to the highway agreement and the performance bond in these cases is identical to the status of Ulmen to the highway contract and bond in the National Surety Company case. Further applying the Ulmen decision to the cases at bar it is apparent that while the contract in the cases at bar, required the contractor to "carry public liability insurance to indemnify the public for injuries or damages sustained by reason of carrying on the work" there is no provision in the contract or the bond requiring either the contractor or the appellant, as surety, to pay damages suffered by the public through the contractor's negligence, and it is further apparent that while the Doheny girls were of a class mentioned or referred to in the contract, they were nevertheless strangers to it and cannot maintain an action to recover against the

appellant, as surety, if there was any failure on the part of the contractor to provide such insurance as was required by the contract. This would even be true in the event the contractor did not provide any form or type of public liability insurance.

This principle is further illustrated in the case of *Schisel vs. Marvill,* 197 N. W. 622 (Iowa). This was an action on a contractor's bond by Schisel who was not a party to either the contract or the bond, to recover damages for personal injuries resulting from the negligent acts of the contractor's employees. The bond in that case was similar to the bond in the cases at bar and the contract required the contractor to "carry liability insurance to indemnify the public for injuries sustained by reason of the carrying on of his work, and to meet the requirements of the Iowa Workmen's Compensation law." The contractor did not furnish the liability insurance and the plaintiff asserted that this constituted a breach of his contract and that his surety therefore became liable. The court held that liability could not be predicated on the statutory bond and that by the terms of the bond claims for damages for personal injuries suffered by third persons were not contemplated. The holding of the court is as follows:

> "Section B-43 is broad in its scope. The contractor purports thereby to 'assume all responsibility for damages,' and to 'indemnify and save harmless' the county and its officers and agents from all claims of any character for damages in consequence

of any neglect or misconduct of such contractor; and to carry liability insurance to indemnify the public for injuries sustained by reason of the carrying on of his work, and to meet the requirements of the Iowa Workmen's Compensation Law. There is no other like provision to be found either in the statute, in the contract, in the bond, or in the specifications herein. The contractor agrees to 'indemnify the public for injuries.' The method of indemnity is expressly specified as 'liability insurance.' Without doubt, the liability insurance referred to herein has no reference whatever to the bond in suit, which has been repeatedly designated by all the parties as a performance bond only. The argument for appellant at this point is that the contractor did not furnish liability insurance, and he thereby breached his contract, and that because of the breach of his contract the surety on the performance bond became liable. It is argued also that, if the contractor is liable under any provision of the contract or specifications, then the question as to whether there was one bond or two would be immaterial and that the surety on either could be held liable. The argument is not sound. The failure to take out liability insurance was not a breach of the contract in any legal sense. It was a condition precedent to the acceptance of his bid by the board of supervisors and to the approval of the contract by the highway commission. The bid was accepted and the contract was approved without requiring liability insurance. The statute did not require such an undertaking. If the board of supervisors and the highway commission had power nevertheless to require it as a condition to the approval of the contract, they had equal power to waive it. The undertaking of this section B-43 resolves itself into two parts: (1) to 'indemnify and save harmless the state and county from all

suits,' etc. (2) To 'carry liability insurance to indemnify the public for injuries,' etc.

"If the contractor had obtained liability insurance pursuant to this provision, would the plaintiff still claim that he had a right to elect to proceed against the surety on the other bond? Liability insurance is not a suretyship. The liability created by it is a primary one and not a secondary; whereas the liability of a surety on a bond is secondary and not primary. The question at this point is not whether the contractor is primarily liable to this plaintiff. We are assuming that he is. The question is whether the surety on his bond is liable beyond the terms of the bond, because the contractor failed to carry liability insurance, and because the public authorities permitted the contract to go into effect without such liability insurance. It is enough at this point to say that, inasmuch as the requirements of section B-43 are not statutory, and inasmuch as the bond signed by the surety was a statutory bond, liability thereunder cannot be extended beyond the statutory requirements. This conclusion is inevitable from the plain terms of all the provisions of the contract and bond and specifications, save only section B-43. It is also significant that the final section of the specifications being B-71 repeats the former enumeration of the kind of liability chargeable to this bond. These repeated enumerations as contained in statute and bond and specifications would have to be wholly ignored as defining the scope of the liability of the bond in order to hold that the plaintiff's claim was within its contemplation. Whether the public officials could exact a valid common-law bond to indemnify the public against such damages as are herein involved is a question upon which we do not pass."

Thus it is respectfully submitted that under the *Ulmen* and *Schisel* decisions the appellant is not liable for the unsatisfied Doheny judgments by reason of having executed the surety bond for the contractor, Coverdale & Johnson.

2. Construction of Contractor's Public Liability Policy.

The Montana Supreme Court has repeatedly held that contracts of insurance are to be construed as any other contracts and with a view of carrying out the intention of the parties.

> McCauley vs. Casualty Company of America, 39 Mont. 185, 102 Pac. 586
> Stevens vs. Steck, et al. 101 Mont. 569, 55 Pac. (2d) 7.

The rules for the interpretation of contracts in this jurisdiction are found in Chapter 108, Revised Codes of Montana, 1935, of which the following have a bearing upon the cases at bar:

Section 7529, R.C.M., 1935 provides:

> "The language of a contract is to govern its interpretation, if the language is clear and explicit and does not involve an absurdity."

Section 7530, R.C.M., 1935, provides:

> "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this chapter."

Under the above statutes it has often been held that

if a contract is plain and unambiguous it needs no construction and it is then the duty of the court to enforce it as made by the parties.

Bullard vs. Smith, 28 Mont. 387, 72 Pac. 761
Frank vs. Butte and Boulder Mining & Lumber Company, 48 Mont. 83, 135 Pac. 904
Union Central Life Insurance Company vs. Jensen, 74 Mont. 70, 237 Pac. 518

It has further been held that when the language employed by the parties is free from ambiguity and uncertainty it is beyond the power of the court to enlarge or restrict its application or meaning and that courts must enforce contracts as made, not make new ones for the parties, no matter how unreasonable the terms may appear.

McDaniel vs. Hager-Stevenson Oil Co., 75 Mont. 356, 243 Pac. 582, 584
McConnell vs. Blackley, 66 Mont. 510, 214 Pac. 64

It next becomes important to determine whether the law requires that the Contractor's Public Liability Policy be construed together with the construction contract and the performance bond. In this connection the appellee, in the court below, insisted that the wording of the contract, as well as the law, required such a construction and the trial court's attention was directed by appellee and much reliance placed upon the same by the court in its opinion (R. 182) to the provision in the contract "all things contained herein together with 'advertisement for proposals' or 'notice to contractors'

and the 'contract bond' as well as any papers attached to or bound with any of the above, also any and all supplemental agreements made or to be made, are hereby made a part of these specifications and contract and are to be considered one instrument." (R. 82)

In the opinion of the trial court the above provision was quoted and the trial court concluded that the language "any and all supplemental agreements made or to be made' 'would necessarily include the Contractor's Public Liability Policy (R. 182) which, according to the opinion and to the court's findings of fact, should be and was construed with the highway contract and the contract performance bond with the result that the exclusion provisions of the policy were held to be inoperative. (R. 190, 198)

If a careful examination of the contract is made it is clearly evident that the words "any and all supplemental agreements" refer not to the public liability policy of insurance, but rather to supplemental agreements between the Montana State Highway Commission and the contractor in regard to the completion of the construction work in an acceptable fashion. It is a matter of common knowledge that changes in plans are often made during the course of construction which necessitate increasing or decreasing quantities and thus require supplemental agreements between the contractor and the owner relative thereto. This is evidenced by specification 4.3 (R. 84) which provides for the making of such supplemental agreements whenever "altera-

tions involve (1) an increase or decrease of more than 25 per cent of the total cost of the work calculated from the original proposal quantities and the contract unit prices, or (2) an increase of 25 per cent in the quantity of any one major contract item." This position is further substantiated by paragraph 9.4 of the contract specifications (R. 87) which provide that extra work shall be paid for either at agreed unit prices under the provisions of a "supplemental agreement" or on a "force account" basis. That paragraph likewise defines a "supplemental agreement" and provides that such an agreement is to be prepared whenever it has been agreed to perform extra work not contemplated in the original proposal and contract and "This supplemental agreement" shall be executed by both of the parties to the original contract, shall thereupon be considered a part of the contract, and payment for the work included therein shall be for the actual quantity performed at the agreed unit prices set forth therein. Extra work provided for by a "supplemental agreement" shall not be started until after the execution of the said agreement." (R. 88).

Therefore we submit that from the very language of the contract documents there was no intention on the part of the contractor or the State of Montana to make the policy of insurance one of the contract documents.

Does the law permit that the Contractor's Public Liability Policy issued by the appellant to the con-

tractor be construed together with the contract and the contract performance bond? The Montana statute on this subject is Section 7533, Revised Codes of Montana, 1935, which provides:

> "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together."

This statute definitely requires, before contracts can be construed together, that they be between the same parties, relate to the same matters and made as parts of substantially one transaction. It should here be noted that the construction contract (R. 89) between Coverdale & Johnson and the State of Montana was executed and delivered on September 21, 1934, and was a contract to which the appellant was not a party. The contract performance bond (R. 99) was executed by the contractor, as principal, and appellant, as surety, in favor of the State of Montana on September 21, 1934. The public liability policy of insurance (R. 123-163) involved in these cases was executed by appellant to the contractor under date of October 1, 1934. Thus the construction contract and the Contractor's Public Liability Policy are between two different parties and were not executed contemporaneously but rather ten days apart and they very clearly do not constitute one transaction.

The general rule on this subject in this jurisdiction is stated in *Union Bank & Trust Company vs. Himmelbauer,* 57 Mont. 438, 188 Pac. 940, which general rule is:

> "Where two or more contracts relate to the same subject matter and were executed at the same time they could not be considered as one contract unless they were executed by the same parties."

Applying the above rules to the facts in the cases at bar it must be observed (1) that the construction contract was between Coverdale & Johnson and the State of Montana and relates to the construction of bridges whereas the Public Liability Insurance Policy was between the appellant and Coverdale & Johnson and relates to indemnity promised the latter at certain definite locations and under certain definite conditions; (2) that the contracts are not between the same parties; (3) that the contracts were not executed or delivered at the same time.

An illustrative case on this question is *State Bank of Darby vs. Pew, et al,* 59 Mont. 144, 195 Pac. 852, wherein the contractor Pew, by written contract, obligated himself to construct a water tight basement under a certain bank building to be constructed by him, as contractor. The building specifications, forming a part of the contract, described the mode of construction, and in addition required that the contractor "shall, upon receiving the final payment for this work, deliver to the owner a written and signed guaranty that the foundation shall be water tight for a period of one year from the date of final acceptance and furnish a

surety bond for $1000.00 to accomplish the guaranty, if required." A surety bond was furnished about a month after the execution of the contract and about one week later than the performance bond accompanying the building contract. The surety bond was given as a guarantee of a water tight basement. The basement was not water tight and the action was brought by the owner for damages. The contractor and the surety claimed that they were relieved from responsibility because the contractor had complied with the plans and specifications and they urged that the bond must be construed together with the contract, specifications and the performance bond. *The court held, however, that the bond was an independent and distinct contractual obligation and, irrespective of having been required by the specifications, it was not to be construed with the original contract.* The following quotation is from the court's decision (page 154):

> "The bond herein involved was executed nearly a month after the building contract had been entered into, and one week later than the bond furnished by the contractor for the complete performance of the building contract. Futhermore, after the basement had been entirely completed, as will be noted, the bond was extended for an additional term. There is no reference, in the bond covering the water-tight construction of the basement, to the specifications, and the only connection with the building contract by way of recital therein is that it is executed pursuant to guaranty required in the building contract."

Apply the reasoning of the *Pew* case to the cases at bar, the policy of insurance was executed ten days after the contract, there was no reference in the policy to the contract specifications respecting insurance and the only connection between the policy and the contract was the recital in the contract that the contractor should carry public liability insurance. Consequently the policy is clearly an independent and distinct transaction.

A case closely analogous to the situation in the cases at bar is *Michigan Stamping Company vs. Michigan Employees Casualty Company,* 209 N. W. 104 (Mich.) in which the owner of a building to which it contemplated repairs, hired the contractor to do the work. The contract contained the following provisions:

> "The general contractor shall, during the continuance of the work under this contract, also extra work in connection therewith, maintain liability insurance in a sufficient amount to protect himself and the owner from any liability or damage for injury to any of his employees or other persons, including any liability or damage which may arise by virtue of any statute or law now in force or which may hereafter be enacted and shall secure and protect the owner from any liability or damage whatsoever for any injury to persons or property."

The contractor entered into negotiations for a policy with an agent of the defendant insurance company *giving the agent a copy of the contract showing the insurance requirements.* The policy when issued contained the following exclusion:

> "This policy shall not cover loss or expense on account of accident caused or suffered by any employee or employees of the assured engaged on work covered by this bond or in connection with the same . . ."

There was an accident resulting in the death of an employee of the subcontractor just before the policy form was sent to the contractor and another accident in which an employee of another subcontractor lost his left hand a few weeks later. The plaintiff made settlements on both accidents and brought this action to recover the sums so expended. The defendant denied any liability on the policy and the court sustained its position.

The court held that the language of the insurance policy was not ambiguous and refused to read into the policy any provisions not contained therein and refused a reformation. In part the court said:

> "There is no ambiguity in the language of the instrument. It was the duty of the court to place a legal interpretation upon it. As construed by the trial court and by this court, plaintiff has no right of action thereunder against the defendant on the facts presented. The practical construction which the parties put upon the contract may be considered only in cases where the language of the instrument may be said to be ambiguous or uncer-

tain. Finnegan v. Worden-Allen Co., 201 Mich. 445, 167 N. W. 930; Zilwaukee Township v. Saginaw-Bay City Ry. Co., 213 Mich. 61, 181 N. W. 37.

"By its claim of estoppel the plaintiff seeks to have the court read into the policy provisions relating to the liability of the defendant not contained therein, or, in other word, to reform the contract in accord with the agreement of the parties at the time the application for insurance was made. The defendant is not here asserting rights under its contract. It simply denies liability thereunder. The burden is on the plaintiff to establish such liability.

"There is a clear distinction between the effect of an omission in a policy which the insurer relies on to defeat the action and one which the insured seeks to have incorporated therein as a basis for recovery. As to the former this court has held that the neglect of the insurer to insert a provision of which its agent was informed at the time of application for insurance was made is, in legal effect, a waiver, and estops it from insisting that its omission constitutes a legal defense to an action on the policy. Gristock v. Insurance Co., 87 Mich. 428, 49 N. W. 634; Simpson v. Insurance Co., 184 Mich. 547, 151 N. W. 610. As to the latter we are of the opinion that the policy must be reformed in order for the insured to obtain the benefit of such an omission.

"The indemnity promised by the insurer, as expressed in the written contract, may not be enlarged by proof of intention."

In *State vs. American Surety Company of New York,* 78 Mont. 504, 255 Pac. 1063, it was held that the rule that more than one contract relating to the same

subject matter, between the same parties, and made as parts of substantially one transaction, must be construed together, has no application in an action on a surety bond conditioned to pay the amount found to be due under the terms of a contract for the sale of state timber if the buyer failed to pay, the parties not being the same and the obligations thereunder being entirely separate and distinct.

Accordingly we submit that the trial court was in error in construing the Contractor's Public Liability Policy with the highway contract and the contract performance bond. The policy should have been construed without reference whatsoever to those other instruments.

At this point it is pertinent to note that the liability of the contractor for injuries to or the death of members of the public occasioned through its negligence was neither greater nor less nor different because of its contract with the State of Montana. Irrespective of the provisions of the contract, it was incumbent upon the appellee, to secure a judgment against the contractor, to prove the essential elements of her causes of action, namely a legal duty, a breach of that duty and damage proximately resulting from such breach.

The State of Montana was naturally interested in providing protection and security to the members of the public who were injured or killed through the negligence of the contractor in the construction of the improvements contemplated by the contract. That in-

tention was evidenced by specification 7.11 of the contract (R. 86) which required the contractor to carry public liability insurance. From the very terms of the contract documents, it is clear that the Highway Commission intended that the public be protected from accidents occurring as a result of defects in the highway at the places and by reason of the improvements being made; or from any negligence created by the construction work; or from the negligent operation of equipment at the places where the stock-passes and bridges were being constructed. The State of Montana clearly had no intention to provide protection to persons injured or killed through the contractor's negligence in the operation of automobiles on the public highways 20 to 30 miles away from the construction work in a traffic accident, any more than did the State of Montana intend that protection be secured for persons injured or killed in the State of New York through the negligent operation of the contractor's private automobile. In other words we believe the common understanding of the language of the entire contract can only lead to the conclusion that the words "carrying on of the work" mean the actual work and labor in the construction of the improvements covered by the contract and not the negligent operation of automobiles many miles away from the job. And it must not be forgotten that the State Highway Commission did neither prescribe the form of the policy nor the terms nor conditions which it should contain. (R. 116) It did

not even require that the original or a copy of the policy be delivered to it (R. 115), but left the contractor and the insurance company from which it would obtain the indemnity free to contract as to what the terms and conditions of the policy should be. There is no requirement in the Montana statutes that a public contractor on public works should provide any liability insurance.

And it should further be noted here that a standard form of contractor's public liability insurance policy was obtained by the contractor from the appellant which, by its very terms, provided indemnity to the contractor "for damages on account of bodily injuries, including death . . . . . by any person or persons other than the employees of the assured, by reason of and during the progress of the work described in statement 4 at the places named therein." (R. 133). The exclusion of the policy provides that the policy shall not cover loss from liability "caused directly or indirectly by . . . . . automobiles . . . . . elsewhere than at the immediate places covered by the policy where the assured is carrying on his operations." (R. 154). Those places were at various points from 12 to 22 miles distant from where the automobile accident resulting in the deaths of Marguerite and Roberta Doheny occurred (R. 131).

This policy provides complete and absolute indemnity for all liability imposed on the contractor by law for injuries and death resulting by reason of and during

the progress of the construction work where the bridges and stock-passes were being constructed, and in addition thereto for accidents occurring at other places under limited conditions. We earnestly believe that the insurance obtained by the contractor fully met the intentions of the State Highway Commission.

By express statute in Montana it is valid for an exclusion to be placed in a contract of insurance. This is clearly stated in Section 8140, R.C.M., 1935, which provides:

> "Where a peril is especially excepted in a contract of insurance, a loss, which would not have occurred but for such peril, is thereby excepted; although the immediate cause of the loss was a peril which was not excepted."

There was no proof in this case, and no contention raised by the appellee, that the contractor did not obtain the type of insurance which he requested from the appellant; nor is there any proof of any mutual mistake.

3. Ambiguity.

There was no issue raised in the court below in these cases that the Contractor's Public Liability Policy was ambiguous in any respect. In fact the contrary was true and the trial court recognized that the exclusion provisions of the policy, if operative, would clearly defeat recovery. We therefore do not propose to extend this brief with any discussion or authorities dealing with the so-called "ambiguity" cases concerning insurance policies.

4. Sufficiency of the Evidence.

The appellee, being the plaintiff in the court below, had the burden of proof and to bring the unsatisfied state court judgments within the policy for her recovery, it was essential that she prove by a preponderance of the evidence that the automobile accident resulting in the deaths of Marguerite Doheny and Roberta Doheny, came within the coverage of the public liability policy, i.e., "by reason of and during the progress of the work" where the bridges and stock-passes were being constructed, (R. 133) and not "caused directly or indirectly by . . . . . any automobile elsewhere than at the immediate places covered by the policy where the assured is carrying on his operations." (R. 154).

This burden the appellee wholly failed to carry. She introduced no oral evidence in these cases to prove that the accident occurred by reason of and during the progress of the work within the terms of the policy and for her proof on this issue, she relied entirely upon the pleadings, evidence, instructions and judgments in the state court actions which were exhibits 1 to 25 inclusive which are not contained in this record on appeal, except the two judgments, Exhibits 9 and 21. (R. 73, 75). Those exhibits were only material or competent in these cases to disclose the issues determined in the state court actions as the state court judgments are res adjudicata as to the appellant only as to the issues there determined. 36 C. J., Sec. 121, p. 1121. Those issues were: First, the Doheny girls were

guests of the partnership, Coverdale & Johnson; second, that the partner Johnson and the employee Bardon, at the time of the accident, were engaged in partnership business; third, that Bardon was grossly negligent in the operation of the automobile and that such gross negligence proximately caused the deaths of the Doheny girls. That these were the issues can be determined from the reported decision of the state court cases; Doheny vs. Coverdale 104 Mont. 534; 68 Pac. (2d) 142.

Thus it will be observed that in the state court it was not necessary that the appellee prove that Coverdale & Johnson, the defendants therein, "by reason of and during the progress of the work" described in the policy at certain designated places, committed grossly negligent acts proximately causing the deaths of the Doheny girls, but rather that the partner Johnson and the employee Bardon were, at the time of the commission of such acts, engaged in partnership business.

The only evidence in these cases, bearing upon this very important issue is that offered by the defendant, which conclusively establishes that the automobile accident occurred 12 to 22 miles distant from the location of the bridges and stock-passes contemplated by the highway agreement, and in fact that the automobile accident occurred in a different county. This evidence further discloses that no work was being performed on those bridges or stock-passes at or near the day of the accident. Thus the appellant's evidence,

standing uncontradicted in the record, clearly establishes that the automobile accident was outside of the coverage of the insuring agreement of the policy and in fact within the exclusion provisions of the policy. (R. 131, 171, 172, 173).

Thus we respectfully submit that the appellee has failed to prove the essential elements of her complaint.

5. Reformation.

The trial court, in its written opinion, in effect reformed the policy, even though there were no pleadings nor prayer seeking a reformation. The pleadings in these cases contain absolutely no suggestion of a cause in reformation; there were no allegations in the complaint setting forth facts sufficient to warrant a reformation. It has been almost universally held by courts that a reformation of an instrument is never made by a court unless a proper case is made by the pleadings. This rule is stated in 53 Corpus Juris, Section 166, page 1012, as follows:

> "The general rules regulating the pleading of a case in equity govern the pleading of a cause in reformation of an instrument. The power to reform instruments, it is said, is exercised by courts of equity with great caution, and never unless a proper case is made by the pleadings. The material facts constituting the cause of action should be set forth in clear, concise, and distinct language, and great particularity of averment is required; thus, great particularity of averment is required to authorize the reformation of a mortgage, or other written contract, or of a description of land in an instrument, or of a deed for mistake. And

at all times the allegations should be specific, and not general."

A general statement as to the material allegations required to plead a cause in reformation is in 53 Corpus Juris, Section 166, page 1012, wherein the rule is stated:

> "In order to make out a good cause of action, the pleading seeking reformation of an instrument should allege or show every element necessary to entitle complainant to equitable relief, including the particular elements hereinafter separately discussed, in particular the instrument as actually made, and as intended and the grounds for reformation. It should be made to appear in the pleading that the pleader has some title or interest to be subserved or protected by the reformation; thus, if the allegations of the pleading show that the pleader has no right to maintain a suit either as the instrument was executed or as he seeks to have it reformed, it is subject to general demurrer. A party whose name is not mentioned in an instrument cannot maintain suit, if his complaint does not connect him with the parties to it."

Furthermore there is not a scintilla of evidence to support a claim of reformation even if such claim had been properly pleaded. There is no suggestion of mutual mistake, fraud or ambiguity. In cases for reformation of instruments, the law requires that courts should exercise great caution and require even a higher degree of proof of the grounds for reformation than in the average civil suit. This rule is clearly stated in 53 Corpus Juris, Section 199, page 1030, as follows:

> "While there are cases holding that, as in other civil cases, a preponderance of the evidence may be

> sufficient to warrant reformation of an instrument, it is generally held that a mere preponderance of the evidence is insufficient, that the courts should exercise great caution and require a high degree of proof, and that, because of the strong presumption that the terms of a written instrument correctly express the intention of the parties to it, mistake or fraud, when urged as a ground for reformation of an instrument, must be established by evidence that is clear, convincing, and satisfactory."

The Montana court has expressed the same rule in *Evankovich vs. Howard Pierce, Inc.*, 91 Mont. 344, 8 Pac. (2d) 653, as follows:

> "It is true that, in order to reform a contract, the evidence of the mistake must be clear, convincing, and satisfactory (Parchen v. Chessman, 53 Mont. 430, 164 Pac. 531; Humble v. St. John, 72 Mont. 519, 234 Pac. 475) . . . . ."

In each complaint, in paragraph VIII thereof (R. 9, 32), appellee alleged that the "co-partners had fully complied with all of the requirements and conditions precedent enumerated in said policy and that plaintiff has complied with all the requirements and conditions precedent and is entitled to maintain this action against defendant, United States Fidelity and Guaranty Company to recover the sum of $5116.89 . . ." No clearer language could have been used to evidence appellee's theory—that she sought to recover under the terms of the policy. At the time of filing these complaints on June 2nd, 1939, appellee knew of the terms and conditions and exclusion provisions of the policy

as appellant had furnished her counsel on August 4, 1937, with a photostatic copy of its daily report (R. 22, 123), which admittedly was a duplicate copy of the terms, conditions and exclusion provisions of the policy. (R. 123, 130, 170, 171)

The decision in the case of *Conley vs. United States Fidelity & Guaranty Co.,* 98 Mont. 31, 37 Pac. 2d 565, is authority for appellant's contention that the Doheny girls were not parties to the contractor's public liability policy, and that that policy was not made expressly for their benefit, within the provisions of Section 7472, Revised Codes of Montana, 1935, which declares:

> "A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties rescind it."

There is no question but that the policy was made expressly for the benefit of the class of persons to which the Doheny girls belonged, and the appellee here can obtain the benefit of this policy only if she can bring the unsatisfied state court judgments within the terms of it.

> Adams vs. Maryland Casualty Co. 139 So. 453 (Miss.).
> Conley vs. United States Fidelity & Guaranty Co., 98 Mont. 31, 37 Pac. (2d) 565.

The appellant, as the insurer in these cases stands squarely upon the policy issued by it. It denies that there is any liability thereunder for the unsatisfied judgments against Coverdale & Johnson. The appel-

lee, as administratrix, from the very moment that a cause of action arose in her favor against Coverdale & Johnson stood in the same position as Coverdale & Johnson as respects the policy and was entitled to equal rights with Coverdale & Johnson thereunder, but no greater rights. She cannot now recover under this policy unless Coverdale & Johnson could have recovered had they paid the judgments.

Sun Indemnity Co. vs. Dulaney, 89 S.W.2d 307 (Ky.)

This rule is clearly stated in *Neilson vs. American Liability Insurance Co.,* 168 Atla. 436 (N. J.) as follows:

> "One who is not a party to a contract but for whose protection a policy provides, can stand only upon the terms of the contract, and if he does not bring himself within its terms there is no liability in his favor," citing Adams vs. Maryland Casualty Co., 139 So. 453, a 1932 Mississippi decision.

It cannot be questioned that if Coverdale & Johnson had paid the state court judgments, no recovery from appellant as insurer could be had by them.

CONCLUSION

In conclusion, the appellant respectfully submits that under the pleadings, facts and evidence in the cases at hand, and under the authority of the cases above cited:

1. That there is no liability on the part of the appellant by reason of having executed the contract performance bond.

2. That the highway contract, the contract performance bond, and the Contractor's Public Liability Policy cannot be construed together and thus change the appellant's liability under the terms of the Contractor's Public Liability Policy.

3. That the policy provisions, including the exclusion provisions, are applicable, operative and controlling and that the appellee failed to prove that the unsatisfied state court judgments were covered by the policy.

4. That there is no pleading, evidence or proof upon which a reformation can be granted.

For these reasons we respectfully submit that the judgment of the trial court in the cases at bar should be reversed.

Howard Davis

W. J. Bowers

Attorneys for Appellant, United States Fidelity and Guaranty Company.

No. 9668.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES FIDELTY AND GUARANTY COMPANY, a Corporation,

Appellant,

vs.

ETHEL M. DOHENY, as Administratrix of the Estate of Roberta Doheny, Deceased,

Appellee,

and

UNITED STATES FIDELTY AND GUARANTY COMPANY, a Corporation,

Appellant,

vs.

ETHEL M. DOHENY, as Administratrix of the Estate of Marguerite Doheny, Deceased,

Appellee.

BRIEF OF APPELLEE

E. J. McCABE,
Attorney for Appellee.

Upon Appeal From the District Court of the United States for the District of Montana

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Filed.....

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BRIEF OF APPELLEE

E. J. McCABE,
Attorney for Appellee.

Upon Appeal From the District Court of the United States for the District of Montana

INTRODUCTORY

The record, before this Court, embraces two volumes, viz., "Transcript of Record" and "Supplemental Transcript of Record." Throughout the within brief matters appearing in the "Transcript of Record" originally filed will be indicated by the letter "R" and matters appearing in the "Supplemental Transcript of Record" by the letters "S. R." followed by the pertinent page numbers of the record.

I.

STATEMENT OF THE CASE

Believing the appellant's statement of the case is unduly restrictive we submit the following facts supplemental to those appearing in appellant's statement.

The contractors Coverdale and Johnson while engaged in the performance of the work under the contract with the State of Montana rented from one Blakeslee a two drum hoist with tractor power and used same in performing the work under the contract for a period of approximately 52 days from and after October 24, 1934. Under the rental agreement this equipment or machinery was to be redelivered to said Blakeslee at the end of the rental period and the drum hoist equipment had been shipped to Great Falls for redelivery thereof to Blakeslee at a date between December 1, 1934 and December 11, 1934. These facts were alleged in paragraphs V and VI in the two complaints filed by appellee as plaintiff in the actions in the state court wherein the judgments involved were recovered (S. R. pp. 243, 244, 285, 286, 287). These alleged facts were expressly admitted as true by the verified answers to said complaints filed by

the copartnership Coverdale and Johnson (S. R. pp. 258, 293) and by the separate answers of the copartner John M. Coverdale to said complaints (S. R. pp. 251, 301). In paragraph VII in each of the two complaints filed in said actions it was further alleged that copartner E. O. Johnson and an employee, George S. Bardon, left Augusta, Montana, about ten o'clock P. M. on or about December 10, 1934, in an automobile, with Great Falls, Montana, as destination for the purpose of unloading and delivering the drum hoist equipment, theretofore rented, to E. H. Blakeslee, and that the two sisters, Roberta and Marguerite Doheny, at the request and invitation of said E. O. Johnson and George S. Bardon to accompany them to Great Falls while they unloaded and delivered aforesaid drum hoist equipment and then return to Augusta, did accompany said Johnson and Bardon in the automobile, and upon their arrival in Great Falls the drum hoist equipment was unloaded and delivered to E. H. Blakeslee, the said Johnson and Bardon assisting in the unloading and delivery of the equipment; that after the equipment was unloaded copartner Johnson, and George Bardon, and the Doheny girls, riding in the same automobile, commenced the return trip to Augusta, the automobile being driven by the employee Bardon under the direction of the said Johnson (S. R. pp. 244-246, 287, 288). Paragraphs VIII and IX of these complaints alleged further, substantially, that on said return trip the automobile was driven by Bardon, under the direction of copartner Johnson, in such a grossly negligent and reckless manner that it left the highway, collided with a large tree and as a result the Doheny girls were injured severely and thereafter died (S. R. pp.

246-248, 288-290). The foregoing allegations of paragraphs VII, VIII and IX of the complaints were denied by the answers of the copartnership and by the separate answers of copartner Coverdale filed in the state court actions (S. R. pp. 251-254, 258-262, 293-297, 301-304). The actions were consolidated for trial and verdict (S. R. pp. 275, 316) and judgments were given to the plaintiff, the appellee in the present actions, for $5,000.00 and costs in each case (R. pp. 73-77). Although the costs appear as $243.26 in each of the judgments these amounts were reduced in each case to $116.89 (S. R. pp. 273-275) by the state court's order taxing the costs.

The evidence offered by plaintiff and defendants in each of the state court actions appears in the bill of exceptions settled by the state court and received in evidence at the trial of the present actions in the lower court as plaintiff's "exhibit 25" (S. R. pp. 322-459). The appellant in the present causes was given notice by Coverdale and Johnson, copartners, of the filing of the cases in the state courts and made an agreement with Coverdale and Johnson relative to investigation and defense of the actions and paid part of the bill of the attorneys who conducted the defense of the state court actions and which attorneys had theretofore represented the appellant in other actions and who are the attorneys who represent the appellant in the causes now on appeal in this court (R. pp. 165-168).

Executions issued on the state court judgments having been returned unsatisfied by the sheriff by reason of no property found (S. R. pp. 281-283, 320-322), oral and written demands for payment were made upon the appellant (R. pp. 34-38, 125).

The appellee, prior to the commencement of the present actions, unsuccessfully endeavored, through her attorney, to obtain the public liability insurance policy, or a true copy thereof, which was expressly required to be carried by Coverdale and Johnson under their contract with the State of Montana (R. pp. 121-125), although a copy of the daily report was furnished (R. pp. 123, 124).

The state court judgments being unpaid the appellee, plaintiff below, filed complaints in the present actions to enforce payment thereof (R. pp. 3-15, 26-38). As appears from the allegations of the complaints the appellee administratrix sought recovery for the deaths of her daughters upon the following grounds: (a) That the deceased were members of the public; (b) the contract between the State of Montana and Coverdale and Johnson expressly required, and Coverdale and Johnson expressly agreed they would carry, public liability insurance to indemnify the public for injuries or damages sustained by reason of "carrying on the work" under said contract; (c) that the appellant executed the surety bond conditioned for the performance of all of the terms of the contract; (d) that the appellant surety under said bond then undertook to write a public liability policy pursuant to the express terms of the contract with the State of Montana, and was paid a cash consideration for doing so; (e) appellant wrote a policy of insurance, the true terms of which appellee could not know, as her request for the original policy or a copy had not been complied with by either the assured or the appellant insurer, but which she assumed had a liability coverage to the extent required by the highway improvement contract

between the assured and the State of Montana; (f) that the deceased girls sustained their injuries and deaths by reason of the carrying on of the work under the contract to their damage in the sum of $5,116.89 each, for which judgments had been obtained against the assured and which were and are unpaid notwithstanding demands made for payment and executions issued and returned unsatisfied; and (g) that said judgments had been affirmed on appeal (R. pp. 3-15, 27-38). Notwithstanding appellant had notice of the state court actions and the judgments and its attorneys in the present cases conducted the defense of the state court suits and were paid part of the fees for defending those suits, by it, the appellant by answers disclaimed knowledge thereof and by denial tendered issue on the allegations of the complaints relative to same and further defended by alleging that the public liability insurance policy issued to Coverdale and Johnson by appellant under the provisions of the highway contract contained "an exclusion under which driving or using any vehicle or automobile was excepted from the coverage of the policy" (R. pp. 55-61).

At the trial of the present actions in addition to other evidence the appellee, for the purpose of proving that the deceased girls were members of the public and were injured and killed by "reason of the carrying on of the work" under the provision of the highway contract, introduced in evidence the judgment rolls of the State Court in the actions in which she obtained the judgments, and which consisted of the pleadings (S. R. pp. 241-316), bill of exceptions containing the evidence and instructions (S. R. pp. 323-459), the judgments (R. pp. 73-77), appeals to State Supreme Court (S. R. pp. 276, 317),

remittitur affirming judgments and notices of remittitur (S. R. pp. 278, 280, 319).

The lower court rendered judgments in favor of appellee from which appellants have perfected the present appeals (R. pp. 200, 202).

ARGUMENT

A. Summary.

Appellee's discussion of the questions of law and fact involved will be addressed to her main contention that the injuries and deaths of Marguerite and Roberta Doheny were sustained by them "by reason of the carrying on the work" under the agreement for highway improvements between Coverdale and Johnson and the State of Montana within the express provisions of the contract for such work (R. pp. 81-102) and entitled to recover from the appellant the amounts of the judgments recovered in the state court against Coverdale and Johnson based upon such injuries and deaths, and that recovery may not be defeated by appellant's claim of nonliability under so called "exclusions" in the public liability insurance policy. In developing appellee's contention we shall make appropriate reference to the points urged in appellant's brief.

1. *The injuries and deaths were sustained by reason of the carrying on the work under the contract.*

It was established by the pleadings (S. R. pp. 243-248, 250, 251, 258), evidence (S. R. pp. 324-420), instructions (S. R. pp. 436-453) and judgments (R. pp. 73, 75) in the cases in the state court, received in evidence as exhibits, that a drum hoist had been used under a rental

contract by the copartners in performing the work under their agreement with the State of Montana and by the terms of the rental contract the hoist was to be redelivered to the owner at Great Falls; the hoist had been used on the work on December 10th, in the afternoon, and on that evening copartner Johnson and employee Bardon accompanied by the deceased girls, proceeded by automobile to Great Falls where the hoist was delivered to the owner. On the return trip to Augusta, Montana, and at a point (Town of Simms) on the same public highway which the copartners were improving under the agreement, the girls were injured and killed by the reckless and grossly negligent operation of the automobile in which copartner Johnson, employee Bardon and the deceased were then riding, and which automobile was being driven by Bardon under the direction and control of copartner Johnson (S. R. pp. 324-346, 349-364, 365-453).

The exhibits from and embraced in the judgment rolls of the actions in the state courts were competent evidence of the matters determined by the state court judgments against Coverdale and Johnson. The rule generally is that to determine the issues and matters adjudged in another action the pleadings and the record in the prior action must be examined.

30 Am. Juris. Judgments, Sec. 284 p. 998.

Standard etc. Co. v. Standard Acc. & Ins. Co., (C.C.A. 8th Mo.) 104 Fed (2) @ p. 496,

United Shoe Machinery Corp. v. United States, 258 U.S. 451, 66 L. ed. @ p. 718.
34 C. J. Sec. 1518, p. 1074.

And such is the rule of the Montana courts.

Callendar v. Sunburst Oil & Ref. Co.,
84 Mont. 178, 274 Pac. 834,

Wells-Dickey Co v. Embody,
82 Mont. 150, 266 Pac. 869.

Section 9409 Rev. Code of Montana, subd. 2, specifies the judgment roll to consist of the pleadings, verdict of the jury, all bills of exception, all orders, matters and proceedings deemed excepted to without a bill of exceptions and a copy of any order made on demurrer or relating to a change of parties and a copy of the judgment.

The judgment roll being a judicial and public record same is prima facie evidence of its contents by virtue of express statutory provision in Montana.

Secs. 10540, 10544, 10554 Rev. Codes.

Clearly it appears that the injuries and deaths of the deceased girls were sustained by reason of the carrying on the work by Coverdale and Johnson under their agreement. However, appellant urges the evidence does not establish such facts (Appellant's Brief p. 40).

The drum hoist was acquired by the copartners for the purpose and used to carry on the work under the agreement. One of the conditions of the rental agreement was that the hoist would be redelivered to the owner at Great Falls. In connection with the delivery of the hoist an automobile was used with intent to convey the copartner and the employee to Great Falls to effect delivery and bring them back to the scene of the work under the contract. In attempting to accomplish this purpose the copartnership used the automobile in a manner prohibited by law (recklessly and grossly negligent) and

thereby caused the injuries and deaths of the deceased daughters of the administratrix. The carrying on the work under the agreement was the reason sine qua non the girls would not have been injured. In other words, if the copartners did not have the work to perform under the contract which necessitated their using the drum hoist equipment the girls would not have been injured with resultant death. In the lower court witness Coverdale stated the partnership was not working on the projects on the Augusta-Sun River road but were working on the bridge on the Augusta-Choteau road at the time of the accident. He admitted that bridge work on the Sun River-Augusta road had not been completed (R. p. 131). In the complaints filed in the County Court it was alleged that between on or about September 25, 1934 and February 1, 1935 the copartnership was engaged in construction work on bridges in connection with and as improvement of a part of the Augusta-Sun River highway under the agreement with the State of Montana, and that the drum hoist was used in performance of said work (S. R. pp. 243, 244, 285-287). Both the separate answers of John M. Coverdale and the answers of the copartnership admitted these allegations of the complaints (S. R. pp. 251, 258, 293, 301). Witness Bernhardt, employee of the partnership on the work, testified at the County Court trial that the hoist had been used on the work on the Sun River-Augusta highway and had finished using it that afternoon (S. R. pp. 330, 331, 334, 340), on the day preceding the injuries to the girls. Mr. Coverdale testifying in the County Court trial stated that he was in Anaconda from December 8th to late in the afternoon December 11th (S. R. pp. 428, 429).

He made no statement at that time that the work was not being done on the Sun River-Augusta highway, nor did he deny that the hoist had been used up to and including the afternoon of December 10th on the Sun River-Augusta project, nor deny that the injuries and deaths of the girls occurred as a result of the gross negligence of the copartnership in connection with the redelivery of the hoist (S. R. pp. 428-430), hence his statement at the trial of present causes that at the time the accident happened the copartners were working on the Augusta-Choteau road, referred to on Page 41 of appellant's brief, does not disprove the evidence that the hoist equipment had been used on the Augusta-Sun River unit on December 10th. As will appear from subsequent discussion herein of the law as to the effect of the trial and judgments in the County Court (Post pp. 40, 41), any controversy on this point is foreclosed and the judgments having established that the drum hoist was used on the Sun River-Augusta Highway unit such judgment is binding upon the defendant insurance company in this action. In any event, Mr. Coverdale not being present on the work from December 8th to late in the day of December 11th, cannot know of his own knowledge what work was actually done on the Augusta-Sun River unit during his absence. Strange indeed was the failure of Mr. Coverdale and the appellant corporation to produce in court the testimony of a foreman or workman who was present on the work during that period to testify that no work was done on this unit if it was his intention that the court believe such was the fact, especially in view of the circumstance that he and his attorneys knew of the admissions in the pleadings and the testi-

mony of employee Bernhardt at the trial in the state court. The rule by statute in Montana is that where inferior evidence is produced when higher proof can be introduced it is presumed the higher evidence would be adverse to the contention of the party offering the evidence inferior in character.

Secs. 10606, subd. 6, 10672, subd. 6, 7 and Sec. 10700, Rev. Code.

2. The "exclusion provisions" of the Public Liability Insurance Policy do not prevent recovery by appellee.

(a) *Ambiguity:*

On page 39 of appellant's brief appears a statement to the effect that there was no issue of ambiguity in the terms of the insurance policy raised in the court below and dismisses the question from consideration. Appellee does not agree with appellant on that point. The question of uncertainty of the extent of the coverage under the terms of the policy read by itself and its ambiguity was discussed in the briefs of the parties presented to the lower court, and we believe the discussion of matters following will establish the uncertain and ambiguous character of the policy. The accepted rule of construction is that a liability policy must be construed liberally in favor of the insured and strictly against the insurance company.

Commercial Casualty Co. v. Stinson,
111 Fed. (2) 63.

The contract expressly fixes the situs among others of the work or improvements as the Augusta-Sun River Road, and elsewhere in the State of Montana (R. p. 148) and the policy itself (R. p. 133) expressly embraces injuries, including death, "by reason of and during the

progress of the work described in Statement 4 at the places named therein and *elsewhere if caused by employees of the assured engaged as such in said operations at said places; but who are required in the discharge of their duties to be from time to time at other places,*" (Italics ours). If the paragraph stopped at that point there could be no question that the deaths of plaintiff's intestates were within the protection of the policy, the evidence being that the injuries were sustained by reason of and "during the progress" of the work and were caused by employees of the assured whose duties required them to be at other places. The policy then protects against injuries and death caused by employees while engaged in the use or maintenance of an automobile upon the "insured premise" (R. pp. 135, 136), or caused by an "automobile" * * * "at the immediate places where the assured is carrying on his operations" (R. p. 155). Analyzing the policy applicable to the places described in Statement 4 several different meanings may be drawn. It may be liberally construed as protecting against injuries caused by employees using automobiles at any place on the Augusta-Sun River Road on which the improvements were made but not elsewhere, or it may be construed as embracing only injuries caused by automobiles used by employees of the assured whose duties do not require them to be elsewhere than on the Augusta-Sun River Road, or again it may be construed as excluding injuries caused by employees using automobiles on the Augusta-Sun River Road which employees are required by their duties to be at other places from time to time, or it may be interpreted to mean that it protects against injuries caused by employees either at the places de-

scribed in Statement 4 or elsewhere provided that such injuries are not caused by automobiles, or it may be read to mean that it covers only injuries other than by automobile caused by employees while and whose duties require them to be at the place or places of operation and elsewhere and excludes injuries caused by employees whose duties require their presence at all times at the place of operations and never elsewhere. Scrutiny of the language of the paragraph will disclose that all of the above and additional varying meanings may be reasonably inferred. Further, the extent and place of coverage is described as injuries and death sustained "by reason of and during the progress of the work described in Statement 4 at the places named therein and elsewhere." Reference to Statement 4 will show that the places named are described in sufficiently broad language as to include the entire road unit known as the Augusta-Sun River Road, that is, the stretch of road between Augusta and Sun River, and which includes the point on such road at Simms where the deceased were injured.

If the strict interpretation of the policy without resort to the surrounding circumstances urged by defendant, as hereinafter discussed (Post pp. 20-37), be adopted the only injuries covered by the policy would be those sustained while an employee is using or maintaining an automobile while physically standing or moving upon the uncompleted bridge or stockpass, an interpretation which leads to absurdity.

It will be observed that there is a conflict between the provisions of Paragraph 1 of the insuring agreement which excepts injuries by employees using automobiles or other vehicles (R. pp. 133, 134) and the terms of

exclusion No. 3 and endorsement (B) (Record pp. 154, 155) which inferentially protects from injuries by automobiles used or maintained upon the insured premises (R. p. 136) or where assured is carrying on his operations (R. p. 155). Manifestly the policy is uncertain as to intention as to what injuries are covered or what excepted, or what the places are within the protection of the policy where the assured is carrying on its operations. What can be designated with certainty as the "immediate places" where the assured is carrying on his operation as stated in the endorsement when considered with the provisions of paragraph I of the insuring agreement which describes the injuries within its protection as those sustained "by reason of and during the progress of the work described in Statement 4 and elsewhere"? The language can be reasonably interpreted as including any point on the Augusta-Sun River Road unit where employees are engaged by reason of the work, or it may be deemed to mean only the physical structures being built. Consequently, if defendant's contention that the policy alone may be considered, is adopted, the Court is confronted with such uncertainty as to risks and places insured that it cannot be said just what is covered by the policy. Thus by defendant's very argument the Court must then look to the surrounding circumstances and the purpose sought to be accomplished in order to say with certainty what the policy means.

> "A contract may be explained by reference to the circumstances under which it is made and the matter to which it relates."
>
> Sec. 7538 Rev. Code Montana.
>
> "For the proper construction of an instrument the

circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown so that the judge be placed in the position of the parties whose language he is to interpret."

Sec. 10521 Rev. Code Montana,
(See also authorities herein post pp. 20-27).

By virtue of the above statutes the policy is to be construed with reference to the original contract and bond, and in addition the language of the policy is to be interpreted most strongly against the defendant company, who is responsible for the uncertainty.

Sec. 7545 Rev. Code Montana.

Appellant urges that neither fraud, mistake nor ambiguity in the insurance policy is pleaded (Brief p. 17). The evidence in the lower court disclosed that until appellant introduced the insurance policy at the trial in the lower court the appellee had never had access to same, nor to a copy thereof, although she had endeavored to obtain same both from the appellant and from the co-partners without success, and although a copy of the daily report was furnished by appellant it stated in the letter accompanying the daily report that "it is not possible for us to give you an exact copy of the policy that was issued" (R. pp. 121-129).

By the introduction of the policy by appellant (R. pp. 132-163) the uncertainty of the extent of its coverage was first made to appear.

(b) *Construction of the Contract.*

To determine the measure of appellant insurer's liability the appellee contends that the agreement with the State of Montana (R. pp. 81-99), the bond (R. pp. 99-103) and the policy written (R. p. 133) must be con-

strued together. The insurer at the trial indicated its view to be that liability of appellant company must be determined by the express language of the policy alone and the agreement and bond pursuant to which the policy was required to be written may not be considered. Insurer's view resolves itself into the following anomalous contention:—The State of Montana as two of the conditions of giving Coverdale and Johnson the highway improvement contract required that a bond with responsible surety be executed conditioned that the partnership would "in all respects faithfully perform all the provisions of such contract and his, their or its obligations thereunder, including the specifications therein referred to and made a part thereof" (R. p. 83), and further required the partnership to carry "public liability insurance to indemnify the public for injuries or damages sustained by reason of carrying on the work," and that the contractor "shall submit adequate evidence to the Commission that he has taken out this insurance" (R. p. 86 par. 7. 11); that the appellant executed the bond as "Surety," was paid the premium, and thereby obligated itself that the foregoing requirements of the contract would in all respects, including the specifications thereunder, be faithfully performed by the copartnership; that the same corporation after being paid the premium as evidence of the carrying of public liability insurance by the partnership as required by the contract notified the Commission by letter, conformable to a letter from the Commission to Coverdale and Johnson, it had issued the public liability insurance to Coverdale & Johnson in the amounts specified by the contracts (R. pp. 110-114); that neither the policy issued nor a copy was sub-

mitted to the Commission (R. pp. 114, 115); and notwithstanding all of the foregoing instead of the policy written containing expressly the general liability obligation to indemnify the public for damages or injuries sustained by reason of carrying on the work (R. p. 86) it apparently attempted to limit, narrow and restrict this liability by printed statements in the policy excluding and excepting injuries and death under certain circumstances caused by driving or using any vehicle, or automobile or draught animal, or in doing other specified things (R. pp. 133-136, 154, 155), thereby making the policy a limited liability policy instead of a general liability policy as demanded by the highway contract, and thus by the simple expedient of failing to have the insurance policy conform to the promises of the "partnership" and the "surety" (appellant insurer) under the agreement and bond the insurer relieves itself from liability for injuries to the public. This contention and obvious attempt to defeat liability might be viewed indulgently if the obligation had been assumed as a matter of favor and without consideration, but advanced by the appellant who was paid to write the bond and was paid to issue the policy and upon the promise of doing which a contract had been made with the partnership is a revolting one from the standpoint of the sanctity of contractual obligations and ordinary fair dealing. To permit such a contention to prevail would defeat one of the most important provisions of the contract, the protection of innocent members of the public from the negligence of the contractor in carrying on the work. If the issuance of a policy of that character can be tolerated or sustained under the highway agreement then the in-

surer may so restrict and limit liability to such narrow limitations that the contractual requirement will be wholly meaningless. Neither law nor equity nor common "horse-sense" will support such inconsistency. The appellant insurer undertook the obligation of protecting the public and was paid the premium it demanded therefor. It urges now that it should be granted the financial benefit of the transaction without being required to assume the incidental burden contrary to Sec. 8750, Rev. Code Montana, which requires that he who takes the benefit shall also take the burden.

To evidently forestall any attempt to defeat the provisions of the agreement designed and intended for the protection of the public by a contention of the insurer or of a surety on the bond that each instrument should be construed as a separate and distinct contract the agreement expressly provides it should be understood thoroughly by all concerned that "all things contained herein together with 'Advertisement for proposals' or 'Notice to Contractors' and the 'Contract Bond' as well as any papers attached to or bound with any of the above, also any and all supplemental agreements made or to be made, are hereby made a part of these Specifications and Contract and are to be considered one instrument" (R. p. 82). Here we find language of an all embracive and inclusive character making the policy of insurance referred to in the contract and to be written as a supplemental agreement thereto a part of the agreement. In signing the bond and issuing the policy in conformity with the agreement the defendant agreed to such provision and is bound thereby. It is estopped by its agreement to now urge a contrary construction.

"One must not change his purpose to the injury of another."

Sec. 8741 Rev. Code Montana,

Gilna v. Barker,
78 M. 357, 369, 254 Pac. 174.

Independent of the express contractual provision requiring an interpretation of the various instruments as one agreement, the rule of construction followed by the courts of the State of Montana and of other jurisdictions is stated as follows:

"Where several instruments are made at the same time in relation to the same subject matter they may be read together as one instrument and the recitals in the one may be limited by reference to the other. This rule obtains even when the parties are not the same if the several contracts were known to all parties and were delivered at the same time to accomplish an agreed purpose."

Peterson v. Miller Rubber Co.,
(C.C.A. 8th Cir.) 24 Fed. (2) 59,

Union Bank v. Himmelbauer,
57 M. 438, 188 Pac. 940,

Dodd v. Vucovich,
38 M. 188, 99 Pac. 296,

Fidelity & Dep. Co. v. Hershey,
(Colo.) 25 Pac. (2) 178,

Busch v. Hart,
(Ark.) 35 S.W. 534.

"Where several instruments are made as a part of one transaction they will be read together and each will be construed with reference to the other."

13 C. J. Sec. 487 p. 528.

In Gary, etc. Co. v. Carlson, et al., 79 Mont. 111, 255 Pac. 722, held, where a surety bond is given for performance of a contract the bond is made with relation

to the contract and as a part of it, the two must be construed together and the surety binds itself to the performance of those acts which the principal promises to perform as a part of his contract and hence where a contractor promised to pay laborers and materialmen and fails to do so they may sue the surety directly on the bond in their own names as a contract made for their benefit as third parties under Section 7472 Rev. Code Montana.

With reference to the construction of insurance policies the following rules are applicable:

"The contract should be construed as a whole together with other papers or documents which constitute a part of the contract; a statutory regulation under the particular employment or acts in respect to which insurance is effected enter into and form a part of the policy and must be read in connection therewith. The policy is construed liberally in favor of the insured and against the insurance company. A liability insurer cannot invoke the strict rules of construction which apply for the protection of gratuitous sureties and a narrow technical construction of the policy or of the petition in the former action against the insured for a liability covered by the policy is not permissible to defeat the insurance."

36 C. J. p. 1061, Sec. 14,

Creem v. Fidelity etc. Co.,
126 N. Y. S. 555, modified on other grounds
206 N. Y. S. 733, 100 N. E. 454,

"Where not inconsistent with other parts of the contract or incompatible with the surrounding facts and circumstances or the subject matter every material word should be given meaning and effect. However the court is justified in ignoring part of the language of the contract where in view of the subject-matter it is meaningless, inapplicable or inoperative or where to give effect it would lead to unreasonable results

defeating the manifest intention of the parties and the object and purpose they had in view in entering into the contract."

32 C. J. p. 1158, Sec. 268.

In determining whether a policy covers a liability the policy may be considered in view of the purpose for which it is sought and the result to be accomplished.

Biwabik Concrete Agg. Co. v. U.S.F. & G. Co., (Minn.) 288 N.W. 394.

Park Saddle Horse Co. v. Royal Indem. Co., 81 Mont. 99, 261 Pac. 880.

Williams v. Pac. States Ins. Co., (Ore.) 251 Pac. 258.

In Biwabik etc., Co. v. U.S.F. & G. Co. 288 N.W. 394, a horse owned by the contractor was negligently permitted to stray upon the highway and collided with an automobile in which injured plaintiff was riding. The defendant insurer contended plaintiff's injuries were not within the coverage of the policy. The court held the insurer being cognizable of the nature of the operations of the assured contractor and wrote the policy under knowledge of such circumstances, consideration of such circumstances should be had in determining the purpose of the policy and the intent thereof and affirmed judgment against the insured.

In Park Saddle Horse Co. v. Royal Indemnity Company, 81 Mont. 99, 261 Pac. 880, the Court held the agent of the insurer is presumed to know the character of the insured's business and knew or will be held to know its practices in that business; that the contract is construed liberally on behalf of the insured and against the insurer; that evidence of conversations made preliminary to the consummation of the written liability

policy between the parties may be considered to arrive at the intention of the parties.

In the cited foregoing case a guide in the employ of the insured saddle horse company became lost in guiding a saddle horse party. One of the party after dismounting from her horse fell and injured herself while so dismounted. The Court held the accident happened "on account of or by reason of the use of horses" in the business of the insured and sustained recovery by the injured against the insurer under the above quoted language, as the circumstances under which the policy was written were to be considered in determining the extent of its liability.

Where an insurance company at the time of procuring the policy knows facts and circumstances which would render the policy void under a printed clause in the policy later written, it is held that by issuing the policy and accepting the premium the insurer is estopped to deny liability under the said clause in the policy.

Krpan v. Central, etc., Ins. Co.,
87 M. 345, 287 P. 217.
To same effect: Johnson v. Ins. Co.,
70 M. 411, 226 Pac. 515.

The facts and circumstances surrounding the making of the policy and the purposes thereof may be summarized as follows: An agreement for highway improvements requiring a bond to be written to assure faithful performance of all its terms, one of which was the carrying of liability insurance with a coverage indemnifying the public for injuries sustained by reason of the carrying on of the work was entered into. The bond for faithful performance of the said written contract was written

by the defendant, who thereafter writes the insurance policy and by printed exclusions attempts to change and reduce the extent of liability mandated by the agreement and bond. The agreement by all embracive language made the bond and the policy with the agreement to be construed as one instrument. Construing the said writings together there is a conflict between the provisions as to extent of insured's liability specified in the agreement and the provisions concerning same printed in the policy.

Applying the legal principles above set forth that all instruments should be construed together liberally in favor of the insured and strictly against the insurer and that the provisions of the policy should be ignored and recovery permitted where the provisions of the policy, in view of the subject matter, if given effect would lead to an unreasonable result defeating the manifest purpose and object had in view, it is clear that the provisions of the policy if in conflict with the requirement of the agreement should be held for naught, since to give effect to the policy provisions over the mandated liability of the agreement would defeat the manifest intent and purpose of protecting members of the public from damages for injuries resulting from the carrying on the work, and would permit the insured to profit by its own wrong and constructive fraud, to-wit, by limiting liability and escaping responsibility notwithstanding it had been paid to assume the liability imposed by the highway contract and its issuing its own policy containing an exclusion contrary to the obligation it assumed under its bond for the performance of the liability insurance provision by the partnership and its further act in notifying

the Highway Commission it had written the insurance policy required, when such was not the fact. It is to be born in mind that the attempted limitation was not mentioned nor called to the Commission's attention.

Applying the principle of estoppel ennunciated in Krpan v. Central Ins. Co., 87 Mont. 345, 287 Pac. 217, hereinabove cited, the appellant insurer was familiar with the requirements of the agreement for general liability insurance, executed its surety bond that such insurance would be written and was paid a premium for assuming such liability under its bond. It then undertook to itself write the policy required and placed clauses therein which may be interpreted, if appellant's contention is correct, to reduce its liability notwithstanding it charged and collected the premium for its promise to write an adequate coverage policy. Having accepted the premium and issued the policy as the Court held, in the cited case, it is estopped to deny liability under the so called exclusion clauses.

Another principle of law defeating the claim non liability under the policy is the doctrine invoked in cases of compulsory insurance, as distinguished from voluntary insurance. The principle is illustrated where insurance written is required by statute, that is, under compulsion that the insurance shall comply with the liability specified by statute. In such cases the courts uniformly hold that the statutory provision controls, where the policy provisions are not in accord therewith.

Ocean Acc. etc., Corp. v. Torres,
91 Fed. (2) 464, 468 (C.C.A. 9th),

Malmgren v. Southwestern Auto Ins.,
(S.C. Cal.) 255 Pac. 512.

Ott v. Fidelity, etc., Co.,
S.C. 159 S. E. 635, 76 A.L.R. 4,

Corwin v. Salter,
(Wis.) 216 N.W. 653,

Krueger v. Calif. Highway Indem. Co.,
(Cal.) 258 Pac. 602 Certiorari denied
72 L. ed. 430.

Arizona Mut. Ins. Co. v. Bernal,
(Ariz.) 203 Pac. 338,

Stone v. Inter-State Exchange,
(Wis.) 229 N.W. 26,

Opinion of Justices,
(Mass.) 147 N.E. 681.
The principle is discussed in cases referred to in annotation in 85 A.L.R. 28-30.

The policy written by appellant was written under the compulsory requirement of the highway contract as one of the conditions of giving the highway improvement work to the partnership. The same reason and purpose underlying statutory requirements, i. e. the protection and indemnification of the public enforceable by members of the public in direct actions by such persons against the insurer for injuries sustained, is the basis of the provision in the highway contract in evidence in the instant case, and the same rule is applicable under the statutory rule that where the reason is the same the rule should be the same.

Sec. 8740 Rev. Code Montana.

Insurance provided is liability insurance as distinguished from indemnity insurance and plaintiff is entitled to sue and recover against insurer by direct action.

A policy which reserves to the insurer full and complete control and adjustment of all claims that might

arise under the policy and expressly obligates the insurer to defend any suit against the insured whether groundless or not and insuring against loss and expense is a contract to pay liability and it authorizes recovery as soon as liability attaches to the assured and before it is discharged, and suit may be maintained by injured party.

Slavens v. Standard Acc. Ins. Co.,
27 Fed. (2) 859, (C.C.A. 9th)
(on appeal from D. C. Mont.)

Michael v. American etc., Ins. Co.,
(C.C.A. 5th) 82 Fed. (2) 583.

The policy in case at bar contained a provision, as noted above, for control and settlement of suit, and defense whether groundless or not (R. p. 134).

In Slavens v. Standard Acc. Ins. Co., 27 Fed. (2) 859 (supra), a policy such as was required to be written under the highway contract here, was held to be a liability policy, the person injured the real party in interest and could sue on the policy upon establishment of liability of assured by a judgment.

The quotation from Gary Hay and Grain Co. v. Carlson, 79 M. 111, 255 Pac. 722, (page 19 appellant's brief), is correct as an abstract statement of law, but a reading of the case will disclose that the Court's decision in the cited case expressly decided that the bond must be construed with and "as a part" of the highway contract as the bond "is made with relation to the contract and as a part of it," and supports appellee's contention.

National Surety Company v. Ulmen, 68 Fed. (2) 330, (pages 20, 21, appellant's Brief) is clearly distinguishable on the facts from the instant cause. The Court

in the cited case held that because the contract contained no provision requiring the contractor to pay members of the public for injuries sustained by reason of the failure of the contractor to provide barricades, lights and warnings, a member of the public injured was a stranger to the contract. Obviously there is a marked difference in the cited case where the members of the public were not mentioned and the present case where the agreement expressly mentions members of the public and obligates both the contractor and his surety to furnish liability insurance to indemnify (in other words to pay) members of such public for the injuries sustained by reason of the carrying on of the contract work. In brief, the very conditions not existing under the contract and bond in the Ulmen case are present in the case at bar, to-wit, the plaintiff's intestates being members of the public protected by the contract and bond were not strangers to the contract (Slavens v. Ins. Co. 27 Fed. (2) 859) and there is an express provision in the contract for indemnification (or payment) of such persons as members of the class. For defendant to urge that intestates were strangers to the contract and neither the contract nor the bond contains a provision for payment of the injuries completely ignores the insurance provision of the contract.

The case of Schisel v. Marvill, 197 N. W. (Iowa) 662, (appellant's brief pp. 23-25) at first glance would appear to support the defendant's contention. A study of the decision and the reasons given by the Court as underlying same establishes the inapplicability of the rule of that decision to the present actions. Reviewing the various facts of the cited case given by the court as the basis

for its decision and which are contrary to the facts before this court, the following appears:

(a) In the cited case the Court held the provision for insurance was a condition precedent to the acceptance of the bid by the board of supervisors and approval of the contract by the Highway Commission, and the Commission not having required the liability policy before it approved and accepted the contract the requirement was waived when no policy was written. In our case the Highway Commission wrote Coverdale and Johnson expressly requiring a policy to be written with the obligation of protection as prescribed by the contract and the appellant by letter notified it had issued the public liability policy in accordance with the requirements of the contract, (R. pp. 110, 111, 113, 114) consequently the waiver existing in the cited case is absent here. Nor is appellant in a position to claim a waiver since it wrote a policy and, without submitting either the original policy or a copy to the Highway Commission, represented by written letter the policy issued was as required by the contract (R. pp. 113, 114). The evidence further shows that the Highway Commission accepted such representation as true and by reason thereof it permitted Coverdale and Johnson to proceed with the contract. It also appears that at no time did the Highway Commission have any intimation that the policy written contained provisions which might be interpreted strictly to give only a slight and limited measure of the protection expressly demanded by the contract. In fact, the manner in which the insurance feature was handled and subsequent denial of liability very closely approaches, if it does not constitute, a fraud upon the rights of those

members of the public expressly protected by the contract.

(b) In the cited case of Schisel v. Marvill there apparently is no statute of Iowa such as Section 8758 of the Montana Code which provides:

> "That which ought to have been done is to be regarded as done in favor of him to whom and against him from whom performance is due."

Clearly the defendant both as Surety and as the one who undertook the performance of the contract obligation to furnish the insurance protection mandated by the contract will be regarded as having intended to perform the obligation in full notwithstanding that the policy by one of various constructions may be read as not conforming to the contract obligation.

The principle of the above statute is given practical application in Whittaker v. United States Fidelity and Guaranty Co. (Montana) 300 Fed. 129, and in Continental Insurance Co. v. Bair (Ind.) 114 N. E. 763. In the first case the Court held (a) An indemnified and hired surety on a stay bond on affirmance of a judgment was liable for the amount of the judgment though the bond, because of a mistake or fraud on the part of the principal, did not so provide since such surety had constructive if not actual knowledge of the conditions intended by the Court and parties and such condition was implied: (b) that the circumstances surrounding the execution of the bond showed that the plaintiff must be protected by a bond conditioned for payment of the judgment if not reversed and although the bond given was not sufficiently broad to obligate payment if the appeal taken was affirmed, such obligation would be implied and the surety be compelled to pay, as the liability of

the hired surety is co-extensive with the obligation of the principal and reformation if necessary is available against both.

It will be noted that the same company was resisting payment of its obligation in the cited case on a defense of the same character as one of the defenses urged in the case at bar, to-wit, that the language did not contain words of sufficiently broad liability.

In Insurance Co. v. Bair (supra) held that where insured notified the insurer of the existence of a mortgage on the property and obtained a promise to properly endorse the mortgagee's interest on the policy and the insurer failed to do so equity would treat the policy as having the endorsement thereon with the loss payable to the mortgagee as his interest might appear.

"CONSTRUCTION OF CONTRACTOR'S PUBLIC LIABILITY POLICY ISSUED BY DEFENDANT."

In citation of decisions and Montana statutes under the above head appellant fails to include Sections 7538 and 7545 which are part of the same Chapter on interpretation of contracts as Secs. 7529 and 7530, (quoted on page 26 of appellant's brief), which permits the surrounding circumstances under which the agreement was made to explain same and provides for a strong interpretation against the insurance company who wrote the policy.

In construing Sec. 7533 R. C. M. (brief p. 30) appellant argues that because the contract and bond and insurance policy bear dates ten days apart and because the State of Montana does not appear as one of the parties insured the various documents are not within

the statute. The statute does not require the signatures of every interested party to each of several contracts. If they are "substantially one transaction" they "are to be taken together" (Sec. 7533, Montana Code). Further the Insurance Company and the contractor both had notice by the letter from the Highway Commission that the issuance and delivery of insurance policy was an essential and substantial part of the transaction by virtue of the express requirements of the contract.

Appellant concludes (p. 31 of its brief) that because the contract relates to construction of bridges whereas the insurance relates to indemnity of Coverdale and Johnson they are not between the same parties and not executed and delivered at the same time. The record shows a contract and bond wherein the State of Montana, Coverdale and Johnson, and defendant are parties, and in which the members of the public who may be injured are expressly made beneficiaries, under the insurance requirement. The purpose of this contract is road improvement and the protection of the public. The policy refers to the work under the contract with the State of Montana, makes the injured members of the public party beneficiaries, names Coverdale and Johnson as the assured and obligates the defendant. Further, the contract became fully effective as to the initiation of the rights therein of Coverdale and Johnson only upon execution and delivery of the insurance policy. The statement of the facts refute defendant's argument.

The contract, policy and bond are properly to be construed together because expressly permitted by Section 7538 and Section 10521 Montana Code which provide that for the proper construction of a written instrument,

the circumstances under which it was made, including the situation of the parties and of the subject of the instrument, is to be considered to enable the Court to interpret same.

State Bank v. Pew, 59 M. 144 (p. 31 appellant's brief), refers to an independent bond liability which arose after the contract was completed and the case does not deal with highway contracts and bonds. Any language of this decision which may appear to be in conflict with the later case of Gary Hay and Grain Company v. Carlson, 79 Mont. 111, 255 Pac. 722, which holds the bond and highway contract are one agreement, and the express provisions of paragraph 1.18 of the highway contract (R. p. 82) which makes the contract, bond and supplemental agreements all one agreement, is inapplicable and beside the point.

We have carefully considered the case of Michigan Stamping Works v. Michigan Employee's Casualty Company, 209 N. W. 104, referred to in pages 33 to 35 of appellant's brief. This case involved an indemnity policy in a suit by the assured. The Court in denying recovery in the action which was one at law indicated that the plaintiff in order to recover on the policy would have to have the policy reformed. This would be an equitable action. This Court, since the new rules, may grant reformation and recovery in the one action and this is the practice of the state courts.

Rule 2, Fed. Rules Civil Procedure,
Sec. 9008, Montana Code.

Under the Rules applicable to civil actions the Court grants all relief, both legal and equitable, in the one action.

Michigan being known as a common law state as dis-

tinguished from states known as Code States, like Montana, apparently adheres to the old distinctions between legal and equitable actions. Hence, the reason for the Court not granting relief by way of reformation in the cited case.

In view of the express provisions of the contract expressly requiring the contract, the bond and supplemental agreements to be construed as the one contract, the rule of State v. American Surety Co., 78 Mont. 504, 255 Pac. 1063, cited at page 35 of appellant's brief, is not authority for appellant.

The appellant urges that the Highway Commission left it to the contractor and the insurance company to contract as to the terms and conditions (brief, pp. 37, 38). This is true in part only since the highway contract specifically requires the insurance to indemnify members of the public injured by reason of carrying on of the work, and by letter to Coverdale and Johnson (R. p. 110) the Highway Commission brought to the attention of the appellant the contract requirement of such a measure of protection, and the appellant notifed the Commission by letter (R. p. 113) that such policy had been issued. This correspondence shows that as to the extent of the coverage the Commission insisted the policy conform to the liability stated in the contract.

Appellant boldly asserts (Brief p. 37) that the State of Montana did not intend to include protection to persons twenty or thirty miles from the construction work. The contract was an entire one, and the policy of insurance expressly acknowledged liability for injuries caused by employees not only at the places where the bridges and stock passes were located but at other places.

Appellant claims (page 38 of Brief) the policy being a standard form met the requirements of the contract. This claim is contrary to the facts. In the first place, the evidence does not establish the policy to be a standard liability policy. (See testimony of defendant's witnesses, R. pp. 130-174). There is no law of Montana prescribing a standard contractor's liability policy. Defendant by merely calling the policy a standard form cannot relieve itself from the obligation required by the highway contract.

Section 8140, R. C. M. (p. 39, appellant's brief) has no application, since by the contract and bond the contractor and defendant were required to furnish a policy with the measure of liability required by such contract and they cannot assert a non performance as performance. The argument involves a contradiction. Epitomizing defendant's argument it resolves itself into the novel contention that the obligation of the contract requiring a general liability as stated in specification 7.11 (R. p. 86) and admitting of no exclusions or exceptions other than that the injuries must have been sustained by members of the public "by reason of carrying on the work" has been performed by the furnishing of a limited policy which relieves the insurer from the measure of performance required. In short, that a breach of a contract is a performance of the contract.

"SUFFICIENCY OF THE EVIDENCE."

The entire argument of appellant (pp. 40-42 of brief) under the above entitled heading ignores the evidence consisting of the judgment rolls in the cases in which the judgments were given against Coverdale and Johnson (S. R. pp. 241-459). The appellant says that since there

was no proof offered showing that the girls were injured and killed by reason of the carrying on the work under the contract recovery may not be had. Examining the record we find it is contrary to the appellant's contention. It is to be remembered that the appellant was obligated to defend the actions against Coverdale and Johnson in the state court by the express provisions of the policy (R. p. 134), its attorneys conducted the defense in each action and were paid in part for such services by the insurer (R. pp. 165-168). Such attorneys prepared the answers filed. The original pleadings filed in these actions were received in evidence in the cases at bar. The complaints filed in the state court substantially allege that betwen the 25th of September, 1934, and the 1st day of February, 1935, they were engaged in the performance of the construction and improvement work under the contract; that the drum hoist had been used for fifty-two days in the performance of such work and that in redelivering said hoist under the contract for its use on the work the girls were injured and killed by the grossly negligent and reckless operation of the automobile driver under the direction and control of a co-partner while being used in transporting the co-partner and employees, for the purpose of effecting redelivery, from Augusta to the place of delivery and return (S. R. pp. 243, 244, 285, 286, 287).

Paragraphs V and VI of each complaint allege the foregoing facts as to the period of the work, the use of the drum hoist on the work under the contract and the necessity for its return to Great Falls.

Paragraphs V of the separate answers of John M. Coverdale and of the separate answers of the co-partner-

ship of Coverdale and Johnson filed in each action in the state court admit the allegations of said paragraphs V and VI of the complaints (S. R. pp. 251, 258, 293, 301). The evidence showed that the girls were killed by the reckless and grossly negligent driving of the automobile then being used for the purpose of transporting the employees of Coverdale & Johnson in making redelivery of the hoist used on this work, and the judgments were accordingly given (S. R. pp. 323-431). In the face of the express admissions in the pleadings and the uncontradicted evidence how can it be sincerely urged that the proof is lacking.

It is not amiss to direct the attention of the Court to the proposition that the allegations of the complaints filed in the present actions alleging the injuries and deaths of the deceased were caused by the negligent operation of the automobile by the co-partnership while being used in carrying on the work (Pars. V Complaints) (R. pp. 30, 31, 7, 8) and denied by the allegations of the insurer that it "has not sufficient knowledge or information upon which to base a belief with respect" to such allegations (R. pp. 56, 59). This denial was and is so obviously sham and frivolous as, in our humble opinion, not to raise issues in view of the record and appellant's intimate knowledge gained by its conduct of the defenses to the former actions.

Appellant (p. 41, brief) seeks to limit the issues in the former cases to the general issues stated. The complaints and the evidence in those cases show that the particulars of the use of the drum hoist and the particular circumstances of the negligent acts were pleaded and either admitted by defendant or proven by evidence in the state

court. Hence appellant's statement in the last paragraph that the only evidence on the issue was that of appellant is not conformable to the facts.

(c) *Judgments against Coverdale and Johnson recovered in State Court conclusive against appellant as to matters involved therein.*

The record in the present causes, heretofore discussed herein, discloses that the judgments in the state court against Coverdale and Johnson were based upon the negligence of the contractor in connection with the carrying on the work under the contract. That the judgments so obtained are conclusive against the appellant insurer as to such issues appears from the following authorities:

> Judgment against the insured determines his liability and damages for death resulting from the use of an automobile is conclusive against the liability insurer company as to its liability on the policy where there is no fraud or collusion in obtaining the judgment and the insurance company had timely notice of suit and elected to make no defense, and issues of law and fact tried in the suit may not be raised in the suit against Insurer.
>
> Internat'l Indem. Co. v. Steil,
> 30 F. (2) 654. (CCA 8th, Iowa)
>
> Howe v. Howe,
> (N. H.) 179 Atl. 362, Annotated 106 A.L.R. 520.

> Judgment in an action for wrongful death is conclusive against insurer company under a liability policy insuring against death.
>
> Park v. American Fid. & Cas. Co.,
> 92 Fed. (2) 746 (CCA Tex.)

> Where insurer is notified of the pendency of an action in reference to a liability covered by the policy and is given an opportunity to defend such action as required by the policy whether it does or does not defend or take part in the action a judgment against

the insured is conclusive upon the insurer as to all questions determined which are material to a recovery against it in an action on the policy.

36 C. J. Sec. 121, P. 1121.

B. Roth Tool Co. v. New Amsterdam Gas Co., 161 Fed. 709, (CCA 8th Miss.).

In Slavens v. Standard Acc. Ins. Co., 27 Fed. (2) 859 (CCA 9th) the court held a complaint substantially the same as the complaints at bar was sufficient to state a cause of action, and that the injured person was the real party in interest to sue as party plaintiff.

The policy written authorizes suit by the injured person against the insurance company upon return of execution returned unsatisfied by reason of insolvency of the insured (R. p. 142). The complaints contain allegations to such effect (R. pp. 8, 9, 32). Evidence of these allegations was offered and received by way of the executions issued on the judgments and the certificate of the sheriff (S. R. pp. 281-283, 320-322).

Such evidence is prima facie evidence of insolvency.

Eagle Indemnity Co. v. Diehl, 27 Fed. (2) 76, (C. C. A. 9th) 85 A. L. R. 52-58 (annotations).

Conditions precedent are sufficiently alleged in the complaints and it devolved upon the defendant to set up by special defenses such failures as it proposes to claim (R. pp. 9, 32).

Rule 9 (c) Federal Rules Civ. Proc.

Harty v. Eagle Indem. Co. (Conn.) 143 Atl. 847,

Riggs v. N. J. Fidelity etc., Co., (Ore.) 270 Pac. 479, 72 A. L. R. 1452 (annotations).

(d) Reformation.

The appellant urges that the lower court erred in making a reformation of the policy (brief pp. 42-46).

The court certainly did not decree a reformation of the policy. Relief may be granted a plaintiff without expressly decreeing reformation. When the agreement, bond and policy are read together the intent and obligation binding on the appellant is manifest. The rule is stated as follows:

> If the policy when properly construed in the light of extrinsic facts has the same meaning it would have if reformed and sufficiently shows the agreement no reformation is necessary.
>
> Williams v. Pac. States Ins. Co.,
> (Ore.) 251 Pac. 258.
>
> Lorenz v. Bull Dog Auto Ins. Assn.,
> (Mo. App.) 277 S. W. 596.

In any event, the Court having jurisdiction of the parties and the subject matter may grant any relief consistent with the facts and pleadings, and may decree reformation if the Court deems same proper.

> Rule 2 Fed. Rules of Civ. Proc.
>
> Sec. 9008, R. C. M.
>
> McKinney v. Mires,
> 95 Mont. 191, 26 Pac. (2) 169.
>
> Park Saddle Horse Co. v. Royal Indem. Co.,
> 81 M. 99, 261 Pac. 880.
>
> Stevens v. Equity Ins. Co.,
> 66 M. 461, 213 Pac. 110.
>
> Krpan v. Central, etc., Ins. Co.,
> 87 M. 345, 287 P. 217.

The complaints at bar expressly pray generally for such further relief as may be equitable and proper.

Appellant inferentially contends that because a photo-

static copy of the daily report of appellant was furnished appellee that the judgments of the lower court should be reversed because appellee did not maintain an action for reformation (brief pp. 44 and 45).

The record evidence shows how appellee attempted to obtain access to the policy to no avail. Neither the contractors nor the company furnished the policy or a copy. It was only after threat of a court proceeding did the appellant furnish a copy of its "daily report" and even then it did not have sufficient confidence in its own records to enable it to assure appellee that the copy of the daily report was a copy of the policy written (R. pp. 121-130). Until the appellant introduced the original policy in evidence neither appellee nor her counsel knew with certainty what the terms of the policy were. How could she plead a cause of action for reformation when the terms of the writing were unknown? She proceeded in the only way open to her by pleading in the manner which she did.

It was first made apparent to appellee and the court that the policy written was uncertain as to the liability coverage when the appellant, at the conclusion of the appellee's case in chief, introduced the policy in evidence as a part of its case (R. pp. 130-132).

It is a rule recognized in the courts of Montana that where evidence is received without objection the pleadings are deemed amended to conform to the evidence and any relief consistent with the pleadings and evidence may be granted by the court.

Moss v. Goodhart,
47 Mont. 257, 131 Pac. 1071,

Wallace v.. Goldberg,
72 Mont. @ p. 237, 231 Pac. 56.

See also authorities at page 42 ante.

The record clearly establishes that the deceased girls were members of the class for the protection of which the highway contract mandated liability insurance be carried and having sustained injuries and death by reason of the carrying on of the work under the contract the appellant may not escape liability by asserting that it wrote a policy and failed to meet the insurance obligation required expressly by the highway contract.

CONCLUSION.

The appellant having failed to show any meritorious reason for reversal the judgments of the lower court should be affirmed.

Respectfully submitted.

E. J. McCABE,
Attorney for Appellee.

No. 9668

United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Appellant,

vs.

ETHEL M. DOHENY, as Administratrix of the Estate of Roberta Doheny, deceased,

Appellee,

and

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Appellant,

vs.

ETHEL M. DOHENY, as Administratrix of the Estate of Marguerite Doheny, Deceased,

Appellee.

Appellant's Reply Brief

Howard Toole
W. T. Boone
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Upon Appeal from the District Court of the United States for the District of Montana.

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INDEX

CITATIONS

Since the filing of appellant's brief, the appellee has filed with this court a supplemental transcript on appeal and her brief. In order to comment upon the materiality of the supplemental transcript and to argue certain issues raised by the appellee, which we consider to be new issues, this reply brief seems necessary.

(a) Supplemental Transcript on Appeal

In appellant's brief, pages 40 and 41, the court was advised that appellee, in the trial court, introduced no oral evidence to prove that the deaths of the Doheny girls occurred "by reason of and during the progress of the work" within the terms of the Contractor's Public Liability Policy and that for her proof on this issue, she relied entirely upon the pleadings, evidence, instructions and judgments in the state court actions which, in the main, constitute the supplemental transcript in the cases at bar.

The complaints in the state court actions alleged, and the answers admitted, that Coverdale & Johnson had a contract with the State of Montana for the construction of certain bridges and stock passes; that a drum hoist was rented for use by the contractor in the construction of the improvements; that under the rental agreement the hoist was to be delivered to its owner; that the trip to Great Falls by the partner Johnson and the employee Bardon, accompanied by the Doheny girls, was made for the purpose of showing the

trucker where to unload the equipment. However, none of those allegations establish that the contractor was "carrying on the work" when the accident occurred. Those allegations were material in the state court actions only to assist the appellee in establishing one of the essential elements of her cause of action, namely, that the parties were engaged in partnership business when the accident occurred. The fact must be recognized that Johnson and Bardon could well be engaged in partnership business and still not be "carrying on the work" as prescribed in the contract between Coverdale & Johnson and the State of Montana.

We cannot let go unchallenged appellee's statement (p. 12 of her brief) that the witness Bernhardt testified "that the hoist had been used on the work on the Sun River-Augusta highway and had finished using it that afternoon." The testimony of this witness affirmatively shows that in addition to the bridges and stock passes being built on the Augusta-Sun River road, the contractor was performing work on the Augusta-Choteau road and nowhere in his testimony nor in the entire record of the state court cases does it appear what work was being done or at what places by the contractor on the day the equipment was re-delivered to Great Falls.

The issue of whether the contractor was carrying on the work under the contract was not involved or requisite to a recovery by the appellee in the state court cases. The judgments in the state court cases are res adjudicata as to appellant only as to the issues involved

therein, which are enumerated on pages 40 and 41 of appellant's brief and since the issue of "carrying on the work" was not involved, the pleadings and evidence of the state court cases are immaterial in the cases at bar.

(b) Ambiguity.

There was no issue of ambiguity raised in the pleadings in the court below nor was there any finding relative thereto by the trial court. To the contrary the trial court recognized that the policy was a clear and unambiguous contract of insurance. It would now appear that appellee, having heretofore taken the position that the policy exclusions were inoperative, now views the policy as ambiguous. This view is based upon the misconception of the situs and type of improvements covered by the construction contract and described in the policy. The appellee assumes the situs "to include the entire road unit known as the Augusta-Sun River road" (pp. 14, 15, 16 and 17 of appellee's brief) and on this assumption proceeds to argue that there is an ambiguity in the policy.

The situs of the improvements contemplated by the contract is described many times in the contract documents and is also definitely fixed in the insurance policy. The notice to bidders (R. 88 and 89) prepared by the Montana State Highway Department definitely de-

scribed the situs and type of the improvements as follows:

> "The improvement contemplated consists of the construction of the following described structures on Section 'E' of the Augusta-Sun River Road in Lewis & Clark County:
>
> "1. A 2-span 79 ft. concrete bridge across the South Fork Sun River.
>
> "2. A single panel 19 ft. treated timber pile trestle.
>
> "3. Two standard treated timber stock passes.
>
> "4. A 5-panel 95 ft. treated timber pile trestle bridge across Spring Coulee.
>
> "5. A 4-panel 76 ft. treated timber pile trestle bridge across Dry Creek."

In the contract (R. 89 and 90) the situs and type of improvements are described as:

> "Construction or improvement of certain bridges in Lewis & Clark County, State of Montana, U. S. Public Works Highway Project No. NRH-176 'E', Unit 2."

Likewise the same description is contained in the contract performance bond (R. 100).

In endorsement No. 8 to the Contractor's Public Liability Policy (R. 161) the description is as follows:

> "NRH-176 'E', Unit No. 2, being concrete and timber pile bridges on Augusta-Sun River Road, Lewis and Clark County, Montana."

In other words all of the contract documents, as well as the policy itself, clearly and concisely limit the work and improvements to the construction of concrete and timber pile bridges in section 2 of the Augusta-Sun River Road in Lewis and Clark County, State of

Montana. The contract did not call for any road construction. There is nothing in any of the instruments to support appellee's statement that the situs of the work and improvements was "the entire road unit known as the Augusta-Sun River Road." Furthermore in all of the contract documents and in the Contractor's Public Liability Policy the work and improvements were described as being in the County of Lewis and Clark. No work or improvements were described as being within Cascade County, the county in which occurred the highway accident which forms the basis of the two cases at bar.

The exclusion of coverage for injuries or death caused by any automobile appears no less than in four different places in the policy in question. In each place the language used is clear and concise and there can be no doubt as to the meaning of the exclusions. Exclusion provisions in policies similar to those contained in the policy in these cases have generally been upheld by the courts. In *Leaksville Light & Power Co. vs. Georgia Casualty Co.*, 125 S. E. 123, the policy contained the following exclusion:

> "Except drivers and secretary and treasurer, and does not cover loss arising from injuries or death caused by any draught or any driving animal or any vehicle, or by any person while in charge thereof."

The insured there settled the claim of an employee who was injured by the negligent operation of one of

the insured's trucks. The court held that the defendant insurer was not liable under the policy inasmuch as the accident came within the above quoted exclusion. In part the court said:

> "It will be born in mind that this is a policy designed and intended to indemnify plaintiff against damages for injuries caused to third persons in the operation of the work in which the company is engaged, usually localized, and clearly is not intended to afford indemnity for injuries caused by operation of the company's vehicles in moving from place to place. So careful is defendant to stipulate against liability of the latter kind that it appears in the two places excepting drivers from the enumerated schedule, thus bringing them under the effect of subsection (1), and again excepting claims for injuries caused by any vehicle or by 'any person while in charge thereof.'
>
> "We are not inadvertent to the position urged upon our attention by appellant, that a policy, in case of ambiguity, should be construed more strongly against the company, but the principle does not extend to cases such as this, where a policy, explicit in terms and plain of meaning, withdraws a claim from its stipulations."

In *Commercial Standard Ins. Co. vs. McKinney,* 114 S. W. (2d) 338 (Texas), the court had under consideration a Contractors' Public Liability Policy which contained the following exclusion:

> "The Company shall not be liable for or on account of any claim alleging such injuries and|or death . . . . . 2. Caused by the ownership, maintenance or use of a vehicle of any description or of any draft or driving animal; . . . . . "

In that case the employees of McKinney were preparing to park a scarifier and tractor for the night when they were run into by a passenger bus, injuring seven persons traveling in the bus. The plaintiff settled the seven claims and brought suit against the insurer. The court held that the tractor involved came within the word "vehicle" in the exclusion above referred to and that there was therefore no coverage under the policy, saying:

> "This language is broad enough without resort to the statutory definitions to cover the tractor; 'a vehicle of any description' must certainly be construed to include a tractor.
>
> "Had section 2 of the exceptions to the coverage of the policy been a covenant of coverage, and not an exception to coverage, appellee would have had a clear cause of action against appellant for recoupment. If, as a covenant of coverage, section 2 would have made appellant liable, then as an exception to coverage, this section relieved it of liability."

In *Maryland Casualty Co. vs. Texas Fireproof Storage Co.,* 69 S. W. (2d) 826 (Texas), the following exclusion was under consideration:

> "This policy does not cover: . . . .
>
> "(6) any accident caused directly or indirectly by any automobile vehicle or by any draught or driving animal or vehicle owned or used by the assured or by any employee of the assured in charge thereof, unless such accident shall occur upon the premises specifically described in Item IV (a) of the Schedule hereof or on the public ways immediately adjacent thereto;"

The court found that the automobile accident in question occurred thirty-three city blocks from the premises described in the policy and further held that by reason of the policy exclusions above quoted, the insurer was not liable for the injuries resulting from the accident.

In *John Alt Furniture Co. vs. Maryland Casualty* Co., 88 Fed. (2d) 36 (1937), the exclusion under consideration was:

> "Any accident caused directly or indirectly by any automobile vehicle or by any draught or driving animal, or vehicle owned or used by the assured or by any employee of the assured in charge thereof, unless such accident shall occur upon the premises specifically described in Item IV (a) of the Schedule hereof (the premises occupied by the assured)."

The court held that the exclusion did not apply as the injury was not caused by any vehicle, but in this regard the court said:

> "The accident does not fall within the exceptions of the policy which are relied upon by the Maryland. It was caused by no vehicle or animal owned or used by either the assured or any of its employees. If it had been caused by the delivery truck, the loss would have been covered by the Mercury policy."

The Montana Supreme Court recently passed on a similar exclusion in the case of *State ex rel Butte Brewing Company, et al, vs. District Court,* 110 Mont. 250, 100 Pac. (2d) 932, which was a declaratory judgment action to have determined whether the Standard

Accident Insurance Company or the Occidental Indemnity Company, or either of them, was obligated to defend an action brought against the Butte Brewing Company for personal injuries by Richard McCulloh. In the Indemnity Company policy the following exclusion was contained:

> "That the company shall not be liable in respect of bodily injuries or death . . . . . 5. Caused by . . . . . any motor or other vehicle owned or used by the Assured or by any person while engaged in the maintenance or use of same, including the loading or unloading thereof elsewhere than within or upon the premises owned by or under the control of the Assured, including the sidewalks or ways immediately adjacent thereto."

To use the language of the court in holding that the policy of the Indemnity Company did not cover the particular accident involved because of the specific exclusion contained in the policy:

> "Its policy, as above pointed out, covered liability for injuries off the premises if caused by business operations, but excluded injuries caused by any motor vehicle owned or used by the assured, including loading or unloading thereof. Having held that the injuries to McCulloh arose during the unloading process, the conclusion follows that under the express language of the policy of the Indemnity Company, it was exempt from liability. The court properly sustained the demurrer of the Indemnity Company."

It is now argued for the first time by appellee that the claimed uncertainty of the extent of the coverage was not known until the insurance policy was introduc-

ed in evidence at the trial in the lower court. This is asserted on the ground that appellee never had access to the policy or a copy thereof, although she had endeavored to obtain the same from the appellant and from the co-partners without success (p. 18 of Appellee's Brief). The appellee does admit, however, that the appellant furnished her with a copy of the daily report, which is the company's record of the policy and its provisions. In this respect it is pertinent to note that in the letter to counsel for appellee from the appellant, accompanying the copy of the daily report (R. 123), this statement is found: "The daily report should contain all the information set forth on the policy." Furthermore counsel for appellee admitted at the time of trial, and after examining the daily report and comparing the same with the original policy, that the daily report contained all of the policy provisions and exclusions (R. 130). The appellant furnished counsel for appellee with a copy of all of the information in its file with respect to the policy. There is no proof in the record that appellee ever sought by deposition, or by a motion to produce, at any time before the trial of the cases, to compel the production of the insurance policy for examination. It now seems idle for appellee to plead ignorance of the provisions of the policy when in fact her counsel had all of the policy information before these cases were instituted.

This same argument applies with reference to appel-

lee's excuse for not pleading a cause for reformation when the terms of the writing (insurance policy) were unknown. The evidence conclusively establishes that such was not the fact.

We again respectfully submit that the judgment of the trial court in the cases at bar should be reversed.

Howard Poole

W. J. Young

Attorneys for Appellant, United States Fidelity and Guaranty Company.

No. 9668

United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Appellant,

vs.

ETHEL M. DOHENY, as Administratrix of the Estate of Roberta Doheny, Deceased,

Appellee.

and

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Appellant,

vs.

ETHEL M. DOHENY, as Administratrix of the Estate of Marguerite Doheny, Deceased,

Appellee.

Upon Appeal from the District Court of the United States for the District of Montana

---

PETITION FOR REHEARING

No. 9668

In The

United States
Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Appellant,

vs.

ETHEL M. DOHENY, as Administratrix of the Estate of Roberta Doheny, Deceased,

Appellee.

and

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Appellant,

vs.

ETHEL M. DOHENY, as Administratrix of the Estate of Marguerite Doheny, Deceased,

Appellee.

PETITION FOR REHEARING

Comes now the United States Fidelity and Guaranty Company, appellant in the above entitled cause, and by and through its attorneys undersigned, respectfully moves the Court to vacate its decision in the above entitled case dated and filed November 17, 1941, and to grant appellant a rehearing upon said cause upon the following grounds and for the following reasons:

I.

That the majority opinion predicates liability of the

appellant under the contractor's public liability policy upon the theory of equitable estoppel.

The complaint pleads and relies upon the contractor's public liability policy (Tr. p. 5, 6 and 29) and expressly pleads the provisions of the policy (Tr. p. 6, 7 and 30) and pleads compliance with all the requirements and conditions precedent in the policy (Tr. p. 32).

The answer specifically and affirmatively pleads the material exclusion in the policy (Tr. pp. 55, 56 and 59). No reply was filed.

The decision of the appellate Court recognizes the validity of the exclusion but holds it inoperative because of estoppel. The doctrine of estoppel appears for the first time in the decision of the Court.

Rule 8(c) of the Rules of Civil Procedure for the District Courts of the United States provides:

> "AFFIRMATIVE DEFENSES. In pleading to a preceding pleading, a party shall set forth affirmatively . . . estoppel . . . and any other matter constituting an avoidance or affirmative defense."

Rule 12(h) of the Rules of Civil Procedure for the District Courts of the United States provides:

> "WAIVER OF DEFENSES. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, . . ."

Rule 15(b) of the Rules of Civil Procedure for the District Courts of the United States provides:

> "AMENDMENTS TO CONFORM TO EVIDENCE. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; . . ."

Appellant contends that the doctrine of equitable estoppel is based upon these elements: (1) A case where one, by his conduct has misled another, with (2) the intention or expectation that the conduct will be acted upon by the other party who (3) must in fact rely upon the fact indicated by such conduct, (4) to his disadvantage.

Rehearing should be granted because:

A. The plaintiffs in these actions did not plead or rely on an estoppel and, having failed to do so, waived the right to rely thereon, and that no proof of estoppel was offered or made or any amendment made to the pleadings, and defendant had no opportunity at any time, at the trial or on appeal to defend against estoppel.

B. In the majority opinion reference is made to the fact that there was no showing that the policy written by the appellant was a standard form in general use or that policies written by concerns engaged in writing

public liability insurance on behalf of contractors commonly contain exclusion clauses comparable with the one in this case. Appellant respectfully contends that such a showing could and would have been made if the issue of estoppel had been raised by the pleadings or proof, and because of the far-reaching effect of this decision it is respectfully requested that a rehearing be granted and that if appellee is entitled or permitted to rely upon estoppel that the cause be remanded for the taking of further evidence.

II.

That the decision of the Court abrogates freedom of contract by holding that the appellant may not insert exclusions in its contractor's public liability policy issued by it to Coverdale & Johnson. That the Court's holding in this respect further disregards the provisions of section 8140 of the Revised Codes of Montana, 1935, which states:

> "Where a peril is specially excepted in a contract of insurance, a loss, which would not have occurred but for such peril, is thereby excepted; although the immediate cause of the loss was a peril which was not excepted."

III.

That the decision in this case results in the modification of a written contract by invocation of the doctrine of estoppel in that the exclusions in the public liability policy were held not to be applicable.

Appellant respectfully contends that while written

contracts may be held to be modified by existing statutes, or by rules and regulations made by a public board in pursuance of statutes authorizing such rules and regulations, there is no such statute and there are no such rules and regulations in Montana. Appellant therefore respectfully contends that this decision has the far-reaching effect of modifying written contract by law without basic legislation requiring such modification. A rehearing is respectfully requested so that this matter may be presented to the Court.

IV.

The decision of the Court refers to the intent of the State of Montana and particularly the intent of the Highway Commission of the State of Montana in requiring the contractors Coverdale & Johnson to carry public liability insurance and the Court concludes and assumes what form the State of Montana and the Highway Commission of Montana intended the contractor's public liability policy to follow.

That in assuming what was the intention of the State of Montana and the Highway Commission of the State of Montana as to the form of the policy and the terms of the policy the decision disregards the evidence of the witness Whipps, Secretary and Administrative Engineer of the State Highway Commission of the State of Montana, who stated, "The State Highway Commission, since 1929, has never prepared or had prepared a form of public liability insurance policy for

use by contractors under such contracts and the Commission has never prescribed the terms of the form of such policies to be executed under such standard provision as paragraph 7.11 of the standard specifications." (Tr. 115, 116)

V.

The decision in this case grants to any member of the public the right to have a written contract judicially modified by invocation of the doctrine of estoppel, and this, notwithstanding the fact that such individual was not a party to the contract, and the decision further grants such right, notwithstanding the fact that no plea of estoppel was made in the pleadings and no opportunity given the appellant to defend against estoppel. That the decision further grants such right notwithstanding the fact that there is no statute and there are no public rules or regulations upon which a member of the general public might rely as a basis for modification of the contract.

VI.

In view of the far-reaching effect of this decision and in view of the fact that the decision in this case is of the utmost importance to this appellant as well as to the general public and to all companies or persons engaged in the writing of surety bonds and contractor's public liability policies in the United States, and in view of the fact that the decision in this case is without

direct precedent in law, and because the decision itself presents questions and issues which appear therein for the first time in this case, and because of the grounds and reasons hereinbefore set forth in the other paragraphs in this motion, it is most respectfully requested that a rehearing be granted herein.

Howard Veale

Attorneys for the Appellant.

CERTIFICATE

We, Howard Toole and W. T. Boone, Attorneys regularly admitted to practice in the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify that in our judgment the foreging Petition for Rehearing in the consolidated cases of United States Fidelity and Guaranty Company, a corporation, Appellant, vs. Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, Appellee, and United States Fidelity and Guaranty Company, a corporation, Appellant, vs. Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, Appellee, No. 9668, is well founded in law and in fact and that it is not interposed or presented for the purpose of delay.

Howard Toole

W. T. Boone

Dated this 12 day
of December, 1941.

No. 9681

United States

Circuit Court of Appeals

For the Ninth Circuit.

AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 207,

Appellant,

vs.

WALTER P. SPRECKELS, individually, and as Regional Director, 21st Region, of the National Labor Relations Board,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

PARKER PRINTING COMPANY, 543 SANSOME STREET, SAN FRANCISCO

No. 9681

United States

Circuit Court of Appeals

For the Ninth Circuit.

AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 207,

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WALTER P. SPRECKELS, individually, and as Regional Director, 21st Region, of the National Labor Relations Board,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, Southern District of California, Central Division

No. 1076-Y Civil

AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 207,

Plaintiff,

vs.

WALTER P. SPRECKELS, individually, and as Regional Director, 21st Region, of the National Labor Relations Board,

Defendant.

COMPLAINT FOR INJUNCTION

Plaintiff, Amalgamated Meat Cutters & Butcher Workmen of North America, Local 207, for cause of action against the defendant, alleges:

I.

That it is a duly organized and existing labor organization affiliated with the American Federation of Labor.

II.

That the defendant, Walter P. Spreckels, is the Regional Director for the 21st Region of the National Labor Relations Board, and agent in charge of its office in Los Angeles, California.

III.

That the matters complained of herein affect the conduct and operation of Interstate Commerce.

IV.

That on or about October 19, 1938, an election was conducted under the direction and auspices of the National Labor Relations Board, at which plaintiff was chosen as the exclusive bargaining agent for the plant employees of Cudahy Packing Company plant at Los Angeles, California, most of whom were then and now [2] are members of local 207. That plaintiff having been certified by said Board did, on behalf of its members and of the employees in said plant, negotiate a contract governing the hours, wages and working conditions of said employees, which said contract is dated November 2, 1939, and by its terms made binding between the parties until October 24, 1940. That a true copy of said contract is annexed hereto, marked Exhibit "A" and hereby made a part hereof.

That ever since said November 2, 1939, said contract has been and now is a valid and binding contract.

V.

That immediately upon the signing and execution of said contract between the parties thereto, the said employer and the plaintiff and the employees of said plant entered upon the performance of said contract and said employer and said employees, and the plaintiff did continue to operate under and perform in good faith the terms of said contract until the operation thereof was wrongfully interfered with by the defendant, Walter P. Spreckels, purporting to act as agent of the National Labor

Relations Board, more particularly as the Regional Director of said Board for the 21st Region thereof.

VI.

That purporting to act as director of said National Labor Relations Board for the 21st Region thereof, but in truth and in fact acting by color of office only, and beyond and in excess of his authority as Regional Director of the said National Labor Relations Board, the defendant himself, and through his agents, did wrongfully intimidate and cause said employer and numerous employees of said plant who were and are members of plaintiff, and embraced within said contract, from the performance of said contract, and from complying with the full obligations and enjoying the full benefits thereof. That the said Walter P. Spreckels, and his agents, notified the parties thereto in [3] substance and effect that said contract was void, by publishing notices of hearings to be held by agents purporting to act as agent of the National Labor Relations Board, and by giving of notices of an election to be conducted by the said defendant for the alleged purpose of selecting a collective bargaining agent for the employees under said contract, and by authorizing and encouraging one Harry Bridges, and others who claimed to be affiliated with the labor organization known as the C. I. O., to declare and proclaim to said employees that said contract was void, and that the National Labor Relations Board and defendant Spreckels would select an ex-

clusive bargaining agent to represent and bargain for said employees.

VII.

That the acts of defendant complained of in the foregoing paragraph were without justification or excuse in law or in fact, and that such acts caused, and were intended to defendant to cause, the plaintiff to suffer, as a direct result thereof, the loss of a large number of its members and the loss of a large sum of dues that accrued to plaintiff, and caused plaintiff to expend large sums of money in resisting said wrongful acts of the defendant; and that said acts of defendant have further injured the plaintiff by enabling benefits accruing under the said contract to employees represented by the plaintiff.

VIII.

That subsequently, on March 14, 1940, at the behest and upon the representation of the said defendant, the National Labor Relations Board did conduct a hearing in said premises at Washington, D. C., and that the defendant caused said board to take other steps in violation of the contract rights of the plaintiff, by causing an order to be issued that an election be held among the eligible plant employees of said Cudahy Packing Company plant at Los Angeles, California, who were then and there legally [4] represented by the plaintiff, and that the said Regional Director did, by various notices and statements, notify said employees at said plant in substance and effect that said plaintiff was not

their legally constituted and acting exclusive collective bargaining agent, and that the said plaintiff was not authorized to act as collective bargaining agent for the said employees.

IX.

Plaintiff is informed and believes, and upon such information and belief alleges, that subsequent to the said purported election and certification that the said C. I. O. is the exclusive bargaining agent, the defendant and his agents advised and encouraged the said C. I. O. to negotiate a new and different contract between the said Cudahy Packing Company and itself for and on behalf of the employees of said plant. Plaintiff is informed and believes, and upon such information and belief alleges, that the defendant will continue by various and similar acts to further interfere with the performance of the contract now in force and effect as above mentioned, and, that unless restrained by this Honorable Court, will entirely vitiate all of the contract rights accruing to said employees and said plant operating under and by virtue of the terms of the contract hereinabove mentioned, and that the plaintiff, through said acts by the defendant, has suffered loss of prestige and humiliation by the said unwarranted and illegal acts of the defendant, and will, unless defendant is restrained, continue to so suffer.

X.

That plaintiff has been put to the expense of employing its agents and attorneys in resisting the

said illegal acts and interference upon the part of the defendant, and will, unless he be restrained, be put to further and additional expense in the premises. [5]

XI.

That plaintiff has no plain, adequate and complete remedy at law.

Wherefore, plaintiff prays that the defendant be ordered to appear and show cause, if any he has, why he shall not be enjoined and restrained, pending the final determination of the above entitled action, from issuing, authorizing or publishing any statements interfering with, or tending to interfere with, the full and complete performance by the Cudahy Packing Company and Local 207, Amalgamated Meat Cutters & Butcher Workmen of North America, and the certain employees of the Cudahy Packing plant at Los Angeles, California, covered and embraced within the contract of employment dated November 2, 1939, between said Cudahy Packing Company and said Local 207, Amalgamated Meat Cutters & Butcher Workmen of North America, and from holding any hearing or election for the selection of collective bargaining agent, or any certification or designation as collective bargaining agent for said employees, or from taking any other or further steps, directly or indirectly, or through their agents, servants or employees, tending to or having the effect of interfering with, obstructing, intimidating, coercing or influencing the said Cudahy Packing Company, or

the said Local 207, Amalgamated Meat Cutters & Butcher Workmen of North America, or the said employees of Cudahy Packing plant at Los Angeles, California, embraced within the terms of said contract dated November 2, 1939, from adhering to the terms of said contract, or from the full performance thereof; and that pending the hearing on said order to show cause the defendant be temporarily enjoined and restrained from issuing, authorizing or publishing any statements interfering with, or tending to interfere with, the full and complete performance by the Cudahy Packing Company and Local 207, Amalgamated Meat Cutters & Butcher workmen [6] of North America, and the certain employees of the Cudahy Packing plant at Los Angeles, California, covered and embraced within the contract of employment dated November 2, 1939, between said Cudahy Packing Company and said Local 207, Amalgamated Meat Cutters & Butcher Workmen of North America, and from holding any hearing or election for the selection of collective bargaining agent, or any certification or designation as collective bargaining agent for said employees, or from taking any other or further steps, direct or indirectly, or through their agents, servants or employees, tending to or having the effect of interfering with, obstructing, intimidating, coercing or influencing the said Cudahy Packing Company, or the said Local 207, Amalgamated Meat Cutters & Butcher Workmen of North America, or the said employees of Cudahy Packing plant at Los

Angeles, California, embraced within the terms of the said contract dated November 2, 1939, from adhering to the terms of said contract, or from the full performance thereof; that plaintiff may have such other and further relief as to the Court may seem just, meet and equitable in the premises.

W. I. GILBERT,
939 Rowan Building,
Los Angeles, Calif.
REDMOND S. BRENNAN,
Dwight Building,
Kansas City, Mo.
By W. I. GILBERT,
Attorneys for Plaintiff.

State of California,
County of Los Angeles—ss.

William Wilson, being by me first duly sworn, deposes and says:

That he is the secretary of Local 207, Amalgamated Meat Cutters & Butcher Workmen of North America, the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

WILLIAM WILSON.

Subscribed and sworn to before me this 20th day of July, 1940.

(Seal) LILLIAN RAY,

Notary Public in and for the County of Los Angeles, State of California. [7]

EXHIBIT "A"

MEMORANDUM OF AGREEMENT BY AND BETWEEN THE CUDAHY PACKING COMPANY OF THE LOS ANGELES, CALIFORNIA PLANT, MEMBERS OF LOCAL 207 OF THE AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR.

Local 207 of the Amalgamated Meat Cutters and Butcher Workmen of North America has the following officers: President, Vice-President, Recording Secretary, Financial Secretary-Treasurer and a Board of Trustees consisting of three Cudahy employees. The Grievance Committee consists of seven Cudahy employees who are appointed by the President of the Local. There are also Departmental Stewards in each Department.

All officers and members of Local 207 must be exclusively employees of the Cudahy Packing Company's Los Angeles Plant, with the exception of the Financial Secretary-Treasurer, who is also the Business Agent.

1. The Cudahy Packing Company, hereinafter called the Company, does hereby recognize Local

207 of the Amalgamated Meat Cutters and Butcher Workmen of North America, affiliate of the American Federation of Labor, hereinafter called the Union, as the Sole Collective Bargaining Agency for the employees at the Los Angeles Plant, exclusive of employees in a supervisory capacity, drivers, time study men, watchmen, deputized officers and employees on the office and salesmen's payrolls. This exclusion shall apply to all employees referred or covered by this agreement.

2. It is agreed eight consecutive hours shall be the basic work day. All time worked over ten hours in any one day or over forty-two hours in any one week shall be paid at the rate of time and one-half, but there shall be no duplication of overtime. The matter of the use of Tolerance Weeks may be finally opened for discussion and adjustment in accordance with the final ruling of the Administrator of the Fair Labor Standards Act of 1938. In any event, Tolerance Weeks shall not exceed fifty-three (53) hours in any one week and ten (10) hours in any one day.

3. In order to assure to the respective parties the benefits intended to be derived by the Company and the employees from this agreement, the Company agrees to retain in its employ none other than members of Local 207 of the Amalgamated Meat Cutters and Butcher Workmen of North America. Said members must be in good standing in said Local at all times. New employees shall become members of said Local 207, of the A.M.C. & B.W. of N.A.

within fifteen days after employment by the Company and remain in good standing at all times.

4. Employees shall not be required to work more than five hours without time off for lunch, except in cases of mechanical breakdowns and continuous operation of five and one-half (5½) hours on kill out or cut outs. Chain operations and conveyors shall not be required to work more than two and one-half (2½) hours without a ten minute relief period.

5. Two hour pay is the minimum pay any employee shall receive for responding to any call for duty by the employer. All mechanics when called to work shall receive not less than three (3) hours pay.

6. All employees other than shift men and those engaged in continuous operations working on New Year's Day, Decoration Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Day, Armistice Day or Sunday, shall be compensated at a double time rate, except employees who work nights and whose work week begins Sunday and ends Saturday shall not *ne* so compensated. [8]

7. Wages paid shall be at least comparable with established rate*d* paid for similar work in comparable packing houses in Los Angeles County. In any contemplated change in basic rates of pay, a ten day written notice shall be given by the one party to the other for the purpose of negotiating the change or changes.

8. All regular employees shall receive a guaranteed time of thirty-two hours per week, provided

lay-offs may take place up to and including the third workday of the work week, in which case, said guarantee shall not be effective for those employees laid off. It is also agreed that, when there is work to be performed after the third day in a department, regular employees of that department must be called for duty.

9. All employees who have completed two years of continuous service shall be entitled to one week's vacation with pay and those who have completed five years continuous service shall be entitled to two weeks' vacation with pay. The amount to be paid employees during vacaton periods shall be based on their weekly average hours worked during the four weeks immediately preceding their vacations (such hours not to exceed 40 nor be less than 32) at their basic day work rate of pay. Where an employee works on more than one job during the four weeks mentioned, for which different rates are paid, the amount of payment will be figured according to the method now used by the Company. Power Department Shift men and empoyees engaged in wholesale distribution, whose basic work-week is 42 hours, will be paid on the basis of the hours worked during the four weeks' period prior to vacations, such hours not to exceed 42 nor be less than 32.

10. After six months continuous service with the Company, seniority shall prevail for all employees below the grade of assistant foreman. In any reduction of the number of employees, and in rehiring seniority rights shall govern. In any lay-offs

the youngest employees in point of service shall be the first to be laid off, and in re-hiring, the one last laid off shall be the first to be re-hired. In case of all lay-offs and re-employment seniority as to department shall prevail and employment shall be given to all unemployed members of Local 207 in preference to new help in any department. In all Departmental changes involving jobs with a higher rate of pay, consideration shall be given to employees of that department holding seniority. Senority rights of employees shall not be effected by temporary lay-offs not exceeding a period of sixty (60) days. During such time, and employee will be subject to re-call when required for service and failing to report within 24 hours after reasonable notice has been given that the Company desires his service after which he will be considered as having terminated his service with the Company. In case of absence from work due to accident or illness, seniority rights shall not be lost if the absent employee member of the Union notifies the Company within 48 hours and thereafter at intervals of 10 days and after recovery from said accident or illness, shall furnish a doctor's certificate to the effect that such absence was necessary provided, however, that if no doctor attended the absent employee member, such employee member of the Union shall have the right to furnish other suitable proof that such absence was necessary.

11. Employees attending Union Conventions or other similar meetings upon giving reasonable no-

tice to the management, shall be permitted to absent themselves for a reasonable length of time and without pay as long as such absence from the plant does not unduly interfere with the operation of the plant. [9]

12. In the event of any dispute arising relative to any of the provisions of this agreement, the matter shall be arbitrated as follows: The Company, or Employer, shall choose two persons, the Union shall choose two persons, and these four shall choose a fifth person and all five shall act as a Board of Arbitration. The Board of Arbitration shall make its decision within fifteen days. The decision of the Board of Arbitration shall be final and shall be accepted as such by both the Company and the Union; however, if either party feels that such decision is not justified, they shall be allowed the privilege of an appeal within fifteen days to any authorized agency or court of competent jurisdiction they desire.

13. It is agreed that either party will have the right to serve the other party with a ten day written notice that negotiations are desired to open the question of conditions enumerated in this agreement. When such changes are desired by either party, conferences upon same will be held at the office of the Company in Los Angeles, unless otherwise mutually agreed.

14. Should differences arise between the Company and the Union or its members employed by the

Company, as to the meaning or application of the provisions of this agreement, or should trouble of any kind arise in the plant, there shall be no cessation or suspension of work on account of such differences, but the same shall be settled as provided in this agreement.

15. This agreement shall be in full force and be binding upon both parties until October 24th, 1940. This agreement shall automatically renew itself from year to year unless terminated by a 30 day notice in writing by either party,

Approved:

THE AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF N. A. AFFILIATE OF THE AMERICAN FEDERATION OF LABOR.

(Seal) Signed T. J. LLOYD,
Int. Vice President.

LOCAL UNION #207, OF THE AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF N. A. AFFILIATE OF THE AMERICAN FEDERATION OF LABOR.

Signed JOHN CARROLL,
President.
DAVE STRATTON,
Secretary-Treasurer. [10]

The Cudahy Packing Company
803-811 Macy Street
Box 280 Arcade Station
Los Angeles, California.

November 2, 1939.

Mr. John Carroll, President
Local 207, Amalgamated Meat Cutters
& Butcher Workmen of North America,
Affiliate of the American Federation
of Labor.

Dear Sir:

Receipt is acknowledged of your Memorandum of Agreement dated October 24, 1939.

It shall be the policy of this Company to operate in accordance with the provisions set forth in said agreement, provided; however, that no conditions in Paragraph 3 or elsewhere in the agreement, shall require this Company to take any action which its counsel may advise is contrary to the provisions of the Wagner Act or any State or Federal law; and the *the* further provision that the Company shall not be required to compensate Grievance Committee Members or other Union Officials who are employees, for more than three hours in any one week, for time spent on grievances or other Union matters, during regular working hours.

Yours very truly,

THE CUDAHY PACKING COMPANY
C. A. ROBERTS
General Manager.

CAR:SM

[Endorsed]: Complaint. Filed Jul. 22, 1940.

[11]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

Upon reading and filing the verified complaint herein, and good cause appearing therefor,

It is ordered, that the defendant be and appear before the above entitled court in the Court Room of the Honorable Leon R. Yankwich, in the United States Post Office Building, in the City of Los Angeles, County of Los Angeles, State of California, on the 30th day of July, 1940, at the hour of 10 o'clock A. M., or as soon thereafter as counsel may be heard, to show cause, if any he has, why he should not be enjoined and restrained, pending the final determination of the above entitled action, from issuing, authorizing or publishing any statements interfering with, or tending to interfere with, the full and complete performance by the Cudahy Packing Company and Local 207, Amalgamated Meat Cutters & Butcher Workmen of North America, and the certain employees of the Cudahy Packing plant at Los Angeles, California, covered and embraced within the contract of employment dated November 2, 1939, between said Cudahy Packing Company and said Local 207, Amalgamated Meat Cutters & Butcher Workmen of North America, and from holding any hearing or election for the selection of collective bargaining agent, or any certification or designation as collective bargaining [12] agent for said employees, or from taking any other or further steps, direct or indirectly,

or through his agents, servants or employees, tending to or having the effect of interfering with, obstructing, intimidating, coercing or influencing the said Cudahy Packing Company, or the said Local 207, Amalgamated Meat Cutters & Butcher Workmen of North America, or the said employees of Cudahy Packing plant at Los Angeles, California, embraced within the terms of the said contract dated November 2, 1939, from adhering to the terms of said contract, or from the full performance thereof.

It is further ordered, that a copy of the foregoing [13] order to show cause shall be served upon the defendant at least 5 days prior to the said hearing.

Dated at Los Angeles, California, this 22nd day of July, 1940.

LEON R. YANKWICH,
Judge of the District Court of the United States, Southern District of California, Central Division.

POINTS AND AUTHORITIES

Courts will interfere for the purpose of protecting property rights of members of unincorporated associations, in all proper cases, and when they take jurisdiction, will follow and enforce, so far as applicable, the rules applying to incorporated bodies of the same character.

Otto v. Journeymen Tailors' Protective and Benevolent Union, 75 Cal. 308.

The holder of a personal right of membership is protected against any unauthorized act or proceeding on the part of his fellow members, either as individuals, or in their official or collective capacity, by which his enjoyment of such right will be impaired or destroyed. Whenever it is sought to deprive him of his membership, he has the right to insist upon a strict observance of the proceedings therefor prescribed in its constitution or articles of association, and such by-laws or rules of conduct as have been adopted under its provisions.

Dingwall v. Amalgamated Association of Street Railway Employees, 4 C. A. 565;
Lawson v. Hewell, 118 Cal. 613. [14]

When the fact of membership has once been established, the court will, where proper rights are involved, restrain the violation of the rules covering voluntary associations at the behest of anyone who has suffered injury by such violations.

Greenwood v. Building Trades Council, 71 C. A. 159.

An unincorporated labor union may sue and be sued without naming its members in the Federal Court.

United Mine Workers of America v. Coronado Coal Co., 250 U. S. 344.

[Endorsed]: Filed Jul. 22, 1940. [15]

[Title of District Court and Cause.]

MOTION TO DISMISS COMPLAINT

Now comes the defendant Walter P. Spreckels, individually and as "Regional Director, 21st Region" and moves the court to dismiss the Bill of Complaint herein, and, as reasons therefor, assigns the following:

1. It appears on the face of the complaint that this is an action to enjoin defendant Walter P. Spreckels, a subordinate local agent of the National Labor Relations Board, to-wit, Regional Director of the 21st Region, from the performance of any acts in connection with a proceeding arising under an Act of Congress, the National Labor Relations Act (49 Stat. 449; 29 U. S. C. A., Sec. 151 et seq.), said proceeding being entitled before the Board, "In the matter of Cudahy Packing Company and Packing House Workres Organizing Committee, C. I. O.", being the Board's Case No. 1718. Said proceeding, in which plaintiff herein appeared and was represented by counsel, was one for the investigation and certification of representatives pursuant to Section 9 (c) of said Act, in the course of which proceeding, a Decision and Direction of Election was issued by said Board from Washington, D. C., for the purpose of determining whether the employees of Cudahy Packing [16] Company in the unit therein involved, desired to be represented for the purposes of collective bargaining by Amalgamated Meat Cutters and Butcher Workmen of

North America, A. F. L. Local No. 207, plaintiff herein, or by another labor organization called United Packing House Workers of America, Local No. 107, C. I. O. A copy of said Decision and Direction of Election is hereto annexed and marked "Appendix A". Pursuant to said Direction of Election, an election was duly held and a count of the ballots showing that a majority of the votes cast being in favor of the United Packing House Workers of America, Local No. 107, C. I. O., the Board, pursuant to the powers vested in it under Section 9(c) of said Act, did on June 6th, 1940, issue from Washington, D. C., its formal Certification of Representatives, copy of which is hereto annexed, marked "Appendix B", certifying the said United Packing House Workers of America, Local 107, as the representative for purposes of collective bargaining of the employees in the unit in question. With the issuance of said formal Certification of Representatives, the proceeding before the Board was and is at an end, the investigation completed and there is nothing further which is to be done or can be done by the Board or Walter P. Spreckels, as Regional Director, or individually in said proceeding.

2. Said proceeding is one arising under the National Labor Relations Act, the procedure therein provided for is exclusive, and the United States District Court has no jurisdiction over the subject matter thereof and is without jurisdiction to enjoin the Board or its agents in the performance of

the functions vested in the Board under the National Labor Relations Act.

3. The complaint on its face shows that plaintiff is not threatened with or in danger of suffering any great irreparable or immediate injury entitling it to injunctive relief.

4. The remedies for any of the matters set forth in the complaint can only be sought under the procedure provided [17] for in the National Labor Relations Act, which provides for a full, adequate and complete remedy for the matters complained of. That plaintiff has failed to exhaust said administrative remedies under the Act.

5. This defendant Walter P. Spreckels is but a subordinate of the National Labor Relations Board, to-wit, the Regional Director of the 21st Region with limited powers. With the holding of the election and the rendition to the Board on May 17, 1940, of his report of the results of the election, as recited in the Board's certification hereto annexed as Appendix B, this defendant Walter P. Spreckels completely discharged all of his official duties in said proceeding, and this defendant Spreckels has no further duties, powers, or functions in connection with said proceeding. There is, therefore, nothing which this defendant Spreckels can possibly do in connection with said proceeding and there is nothing to enjoin with respect to him.

6. The Board having issued its certification, the proceeding is completed and there is nothing to enjoin with respect to the Board or this defendant.

If the Board had any further functions to perform, only the Board and not this defendant, as a subordinate agent could perform them. It therefore appears on the face of the bill that the matters here sought to be enjoined are those which only the Board and not this defendant can perform. This Court has no jurisdiction over the National Labor Relations Board, because the Board is an administrative agency constituting a part of the executive branch of the United States Government, which cannot be sued except by special act of the Congress of the United States. No such act has been passed. The bill must therefore be dismissed for lack of jurisdiction over an indispensable party.

7. The certification of the Board does not entail any compulsory process which the Board can invoke. It is [18] not a command or an order but a mere certification of fact. Should it be disregarded by the Cudahy Packing Company, the Borad could take no steps whatever until a charge should first be filed with it under Section 10 (b) of the Act against Cudahy Packing Company. Even thereafter the Board would have no compulsory powers. All it could do would be to issue a complaint under Section 10 (b) of the Act charging the Cudahy Packing Company with the commission of unfair labor practices and notice the same for hearing. At such hearing, the plaintiff would have the right to intervene and raise the various matters which it seeks to raise here. Thereafter the Board may issue its decision pursuant to Section 10 (c) of the

Act, and, if it finds Cudahy Packing Company guilty of unfair labor practices, may order it to cease and desist from such practices, and, if one of the unfair labor practices is refusal to bargain with the labor organization certified, may direct it to bargain with such labor organization, the Board would have no power to compel obedience to its order, if issued. To compel obedience to its order, the Board would be obliged to petition to the United States Circuit Court of Appeals pursuant to Section 10 (e) of the Act for the enforcement of its order. The plaintiff would have the right either to intervene in said proceeding or to file under Section 10 (f) of the Act a petition to the said Circuit Court of Appeals under Section 10 (f) of the Act to review and set aside the order of the Board. On the Board's petition to enforce or the plaintiff's petition to review, the validity of the certification of representatives would be put in issue under Section 9 (d) of the Act, which provides as follows:

> Whenever an order of the Board made pursuant to Section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in

> whole or [19] in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

The plaintiff under the procedure of the National Labor Relations Act therefore has a full, adequate and complete remedy for any of the matters complained of in the complaint.

2. Defendant Spreckels further moves that this Bill of Complaint be dismissed for the reason that the cause herein is res adjudicata. On July 1, 1940, plaintiff herein filed a Bill of Complaint in this Court entitled "Amalgamated Meat Cutters & Butcher Workmen of North America, Local No. 207, v. National Labor Relations Board and Walter P. Spreckels, Regional Director, 21st Region", No. 1052-H Civil. Upon consideration of the verified Bill of Complaint, motions to dismiss on behalf of defendant Spreckels and motion to quash summons on behalf of the National Labor Relations Board, Honorable Ben Harrison, Judge, United States District Court, Southern District of California, entered a decree on July 15, 1940, dismissing the bill, quashing the summons and dissolving the temporary restraining order theretofore issued. Save and except for the inclusion of the National Labor Relations Board as a party and the bringing of the bill against Walter P. Spreckels both in his official and individual capacities, the two bills are identical, the entire subject matter of the litigation is the

same, the object to be accomplished by the bill in that case is the same as the object sought to be accomplished by the bill in the present case.

Wherefore defendant Walter P. Spreckels, individually and as "Regional Director, 21st Region" respectfully prays for an order dismissing the complaint herein.

WM. R. WALSH,

Regional Attorney 21st Region, appearing for defendant Walter P. Spreckels, Regional Director, 21st Region, 808 U. S. Post Office & Court House, Los Angeles, California.

[Endorsed]: Filed Jul. 29, 1940. [20]

EXHIBIT "A"

United States of America

Before the National Labor Relations Board

In the Matter of

CUDAHY PACKING COMPANY and PACKING HOUSE WORKERS ORGANIZING COMMITTEE, C. I. O.

Case No. R-1718.

Decided April 17, 1940

Meat Packing Industry—Investigation of Representatives: controversy concerning representation of employees: rival unions; second closed-shop contract entered into between rival union victorious in

a consent election held the year before and the Company, where petition filed prior to making of second contract, petitioner notified Company of majority claim, and at hearing made showing sufficient to rebut showing of majority by contracting union at time of execution of second contract, no bar to—Labor Organization: on an issue raised, petitioner is found to be a labor organization on the basis of the testimony—Unit Appropriate for Collective Bargaining: all employees of the Company on the plant payroll at its Los Angeles plant including receiving clerks, departmental clerks, route clerks, shipping clerks, scalers, and checkers, but excluding supervisory employees, subforemen, department superintendents, timekeepers, time-study men, deputized officers, all other watchmen wherever located, drivers, the hide take-up gang, Kern County employees, and all employees on the office pay roll —Election Ordered.

Mr. Alba M. Martin and Mr. M. A. Prowell, for the Board.

Howlett and Maclaren, by Mr. Elmer H. Howlett and Mr. Towson Maclaren, of Los Angeles, Calif., for the Company.

Gallagher, Wirin, and Johnson, by Mr. Grover Johnson, of Los Angeles, Calif., and Mr. A. J. Shippey, of Los Angeles, Calif., for the P. W. O. C.

Mr. Joseph Padway and Mr. Herbert Thatcher, of Washington, D. C.; Mr. T. J. Lloyd, of Salt Lake City, Utah; Mr. J. F. Voorhees and Mr. John

Carroll, of Los Angeles, Calif., for the Amalgamated.

Mrs. Augusta Spaulding, of counsel to the Board.

DECISION
and
DIRECTION OF ELECTION

Statement of the Case

On October 17, 1939, Packing House Workers Organizing Committee, C. I. O., herein called the P. W. O. C., filed with the Regional Director for the Twenty-first Region (Los Angeles, California) a petition alleging that a question affecting commerce had arisen concerning representation of employees of Cudahy Packing Company, [21] Los Angeles, California, herein called the Company, and requesting an investigation and certification of representatives pursuant to Section 9 (c) of the National Labor Relations Act, 49 Stat. 449, herein called the Act.

On December 22, 1939, the National Labor Relations Board, herein called the Board, acting pursuant to Section 9 (c) of the Act and Article III, Section 3, of National Labor Relations Board Rules and Regulations—Series 2, ordered an investigation and authorized the Regional Director to conduct it and to provide for an appropriate hearing on due notice.

On January 10, 1940, the Regional Director issued a notice of hearing, copies of which were duly served upon the Company, the P. W. O. C., and upon Amalgamated Meat Cutters and Butcher Workmen

of North America, A. F. of L., Local No. 207, herein called the Amalgamated, a labor organization claiming to represent employees directly affected by the investigation.[1] On motion of the Company for a continuance the Regional Director issued an amended notice of hearing on January 16, 1940, copies of which were duly served on the same parties. Pursuant to the notice, a hearing was held on January 25, 26, 29, 30, and 31, 1940, and February 3, 5, 6, 7, 8, 9, and 12, 1940, at Los Angeles, California, before Earl S. Bellman, the Trial Examiner duly designated by the Board. The Board and the Company were represented by counsel, the P. W. O. C. and the Amalgamated by counsel and union officials, and all participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties.

At the commencement of the hearing the Company moved to dismiss the proceedings on the ground that a contract entered into on November 2, 1939, between the Amalgamated and the Company was a bar to the present proceeding. The Trial Examiner did not rule on this motion. For the reasons set forth in Section III below, the motion is hereby denied. The P. W. O. C. moved that the Board take judicial notice that the P. W.

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[1]Service of notice of hearing was also made upon Central Labor Council and Los Angeles Industrial Union Council. Neither of the organizations appeared at the hearing.

O. C. is a labor organization. Since the record establishes this fact, it is unnecessary to rule on this motion. During the course of the hearing the Trial Examiner made several rulings on other motions, objections to the admission of evidence, and the form of questions. The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial errors were committed. The rulings are hereby affirmed.

On March 14, 1940, pursuant to notice duly served on all parties, a hearing was held before the Board at Washington, D. C., for the [22] purposes of oral argument. The Amalgamated appeared and presented its argument. The Company and the P. W. O. C. did not appear. The Amalgamated and the P. W. O. C. filed briefs which the Board has considered.

Upon the entire record in the case, the Board makes the following:

Findings of Fact

I. The Business of the Company

Cudahy Packing Company was incorporated in Maine in 1915. It is chiefly engaged in the purchase and slaughter of livestock and the processing and marketing of the products therefrom. Through its own operations and the operations of a number of subsidiaries whose stock it owns in whole or in part, it is engaged in the business of refining vegetable oils, manufacturing soap and other cleansing materials, pulling, scouring, combing wool, and

mining, producing, and distributing salt. It owns, maintains, and operates approximately 1500 refrigerator and 44 tank cars for the transportation of its products.

The respondent maintains slaughtering and meat-packing plants in Omaha, Nebraska; Kansas City, Kansas; Sioux City, Iowa; Los Angeles, California; Wichita, Kansas; North Salt Lake, Utah; Jersey City, New Jersey; Newport, Minnesota; San Diego, California; Denver, Colorado, and Albany, Georgia. It owns and operates soap and Old Dutch Cleanser factories at East Chicago, Indiana, and Toronto, Ontario, Canada; maintains shops for the construction and repair of refrigerator cars at East Chicago, Illinois; maintains a shop for refining vegetable oils near Memphis, Tennessee; operates a wool scouring, combing, and storage plant at Providence, Rhode Island; and owns and operates a salt mine and refinery at Lyons, Kansas. The respondent maintains 80 branch produce collecting and processing plants scattered throughout the United States.

The Company's meat packing plant at Los Angeles, California, is the only plant involved in this proceeding. For this plant more than 146 million pounds of livestock were purchased in 1939, about 40 per cent of which came from States other than California. From this livestock over 126 million pounds of meat products and other products were processed or manufactured, about 10 per cent of which was shipped to destinations outside Califor-

nia by rail, steamship, or other common carrier. About 8 million pounds of Old Dutch Cleanser were manufactured at this plant during 1939, about 20 per cent of which was shipped to other States, Hawaiian Islands, Philippine Islands, and the Orient. [23]

II. The Organizations Involved

Packing House Workers Organizing Committee is a national labor organization affiliated with the Congress of Industrial Organizations. It organizes packing-house workers and charters local unions whose membership is comprised of such workers. It acts as bargaining agent for packing-house employees and such local unions.

United Packing House Workers of America, Local No. 107, is a labor organization chartered by Packing House Workers Organizing Committee, and through it affiliated with the Congress of Industrial Organizations. It admits to membership all employees of the Company's plant at Los Angeles, California, excluding persons with the power to hire and discharge, recommend hiring and discharging, and those coming under the jurisdiction of other C. I. O. unions.

Amalgamated Meat Cutters and Butcher Workmen of North America, A. F. of L., Local No. 207, is a labor organization affiliated with the American Federation of Labor. It admits to membership employees of the Company's plant at Los Angeles, California, excluding clerical and supervisory employees, watchmen, and deputized watchmen.

III. The Question Concerning Representation

On October 19, 1938, a consent election was conducted under the auspices of the Board's Regional Office among the Company's employees to determine whether they desired to be represented by the Amalgamated or by a then existing local of the P. W. O. C. for the purposes of collective bargaining or by neither. The Amalgamated received a majority of the votes cast.[2]

On November 18, 1938, the Company and the Amalgamated exchanged certain documents which are alleged to have constituted a contract.[3] We assume, without deciding, that these documents constituted a contract and shall refer to them as such hereinafter. By its terms this contract was to expire on October 24, 1939. It also contains a closed-ship provision. The Company consistently refused to enforce this provision, although often urged to do so by officers of the Amalgamated, allegedly because it doubted the validity of such a provision under California law.[4] While the Company's po-

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[2]Out of 685 ballots counted in the election the Amalgamated received 367 votes and the P. W. O. C. local received 291.

[3]These documents are similar in form and general content to documents exchanged on November 2, 1939, which are discussed below.

[4]There was testimony that cases are pending in California courts testing the validity of a closed-shop contract under Section 821 and 823 of the Labor Code of California.

sition that it would not enforce the closed-shop provision was clear to the officers of the Amalgamated, the generality of employees believed that membership in the Amalgamated was a condition of employment. In [24] January 1939 the P. W. O. C. revoked the charter of its local, under the belief that the Company was enforcing the closed-shop provision of the contract between the Company and the Amalgamated.

In August 1939 the P. W. O. C. began a new drive to organize the employees of the Company. In October the Amalgamated started negotiations with the Company looking toward a new contract, in view of the approaching expiration of the existing contract on October 24, 1939. On October 16, 1939, the District Director of the P. W. O. C., accompanied by a national officer of that union, had an interview with the Company's plant manager and superintendent. At that meeting the P. W. O. C. representatives asked whether the P. W. O. C. would receive any consideration from the Company before any new contract with the Amalgamated was signed. They stated that the P. W. O. C. did not then claim to represent a majority of the employees but that it had a substantial membership and expected to have a majority in the near future and hoped to get in touch with the Company again before any new contract was signed. The plant manager replied that "formal proceedings" were not necessary to secure an audience with representatives of the Company and that the Company was "merely trying to run the plant in best way we knew pos-

sible and likewise keep within the law of the land so far as possible." The next day, October 17, the P. W. O. C. filed with the Regional Director its petition in the present proceeding.

On October 20, 1939, there was a conference between a Field Examiner of the Board and two national representatives of the Amalgamated, at which the Field Examiner notified them that the P. W. O. C. had filed a petition on October 17. On the same day, October 20, the Field Examiner wrote T. J. Lloyd, one of the Amalgamated representatives, that from their conference he understood that the Amalgamated would not consent "to any type of informal procedure; i. e., Consent election or Cross-check" in order to adjust the matter. On the same day the Field Examiner also had a conference with representatives of the Company, informing them of the petition filed by the P. W. O. C. on October 17.

On or about October 24, 1939, the final draft of an unsigned memorandum approved by the members of the Amalgamated was presented to representatives of the Company. The bargaining committee of the Amalgamated was accompanied by counsel and by Lloyd, International vice president. Some of the provisions of the contract were discussed. The Company asked no questions concerning the majority of the Amalgamated, but a statement was made by one member of the bargaining committee of the Amalgamated, and verified by the other members and Lloyd, that the Amalgamated members composed a majority of the employees concerned. No proof of this statement was offered or

requested. No final action was taken at this meeting. [25]

On October 30, 1939, the Director of the P. W. O. C. sent a registered special delivery letter to the Company, stating that its membership now included a majority of maintenance and production employees at the Company's plant and that these members were concerned over rumors of a reported renewal of the contract between the Amalgamated and the Company. The letter closed with a request for a conference within 5 days. This letter was duly received by the Company. No reply of any kind was received by the P. W. O. C.

On November 2, 1939, the Company and the Amalgamated signed papers which they allege constitute a legally binding contract and a bar to this proceeding. The P. W. O. C. contends it is not a legally binding contract. The alleged contract consists of two writings. The first writing, signed by the Amalgamated, is an undated three-page memorandum which was previously discussed with the Company. It sets forth specific provisions appropriate to a bargaining contract, and contains a provision requiring membership in the Amalgamated as a condition of employment. By its terms it is to be in effect until October 24, 1940,[5] subject to

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[5]The expiration date—originally November 2, 1940—was changed to October 24, 1940, because of anticipated pertinent changes in Wage and Hour regulations. For the same reason the contract of November 18, 1938, was drawn to terminate October 24, 1939.

automatic renewal from year to year unless terminated by a 30-day written notice by either party. The second writing dated November 2, 1939, is a letter to the Amalgamated signed by the Company. It acknowledges receipt of a memorandum dated October 24, 1939, and states "it shall be the policy of the Company" to operate under its provisions unless counsel advises otherwise, with specific reference to the closed-shop provision—Section 3 of the memorandum. There was added a stipulation not found in the memorandum. There is nothing in the minutes of the Amalgamated to indicate that the letter was ever read to the members.

On November 20, 1939, the Director and an official of the P. W. O. C. called on the Company to learn whether a contract had been signed with the Amalgamated. They were told that whatever steps the Company had taken had been with the advice of counsel. On December 20, 1939, the P. W. O. C. formally grouped the employees organized by it into a local called Local No. 107, United Packing House Workers of America, which it chartered.

Assuming, without deciding, that the documents exchanged between the Company and the Amalgamated on November 2, 1939, constitute a contract, we find that it is not a bar to a determination of representatives at the present time. This contract, which purports to require membership in the Amalgamated as a condition of employment, was entered into after the P. W. O. C. had filed its petition, after both the Company and the Amalgamated had

been informed of the filing of the petition and that the P. W. O. C. claimed to represent a majority [26] of the Company's employees, and at a time when the P. W. O. C., as we find below in Section VI, had obtained over 300 authorization cards purportedly signed by employees of the Company, a number sufficient to rebut, as we find in Section VI below, the Amalgamated's showing of majority representation at the time the contract was executed and any presumption of continuing majority representation arising by virtue of the Amalgamated's victory in the consent election of October 1938.[6]

IV. The Effect of the Question Concerning Representation Upon Commerce.

We find that the question concerning representation which has arisen, occurring in connection with the operations of the Company, Section I above, has a close, intimate, and substantial rela-

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[6]See Matter of Southern Chemical Cotton Company and Textile Workers Organizing Committee, 3 N. L. R. B. 869. In this case we said:

> If, as in this case, an employer enters into an agreement with one of two labor organizations at a time when both are claiming the right of exclusive representation, we must hold that the agreement cannot bar our conducting an election, unless we are convinced that at the time of its execution the labor organization with which it was made represented a majority of the employees.

tion to trade, traffic, and commerce among the several States, and tends to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Appropriate Unit

The Company and the unions agree that there should be included in the bargaining unit all employees of the Company on the plant pay roll at its Los Angeles plant, excluding supervisory employees, subforemen, deputized officers, all other watchmen wherever located, drivers, and Kern County employees; that whether on plant or office pay roll, all department superintendents, timekeepers, time-study men, and the hide take-up gang, are to be excluded; and that no persons on the office pay roll are to be included in the unit.

The only difference between the unions concerns receiving clerks, departmental clerks, route clerks, checkers, scalers, and shipping clerks. The P. W. O. C. contends that they should be excluded from the unit, and the Amalgamated contends that they should be included. These six classes of employees were eligible to vote in the consent election held in October 1938, to which agreement the Amalgamated and a local of the P. W. O. C. were parties. Since that election these employees have been included in the unit of employees concerning whom the Company and the Amalgamated have had bar-

[27] gaining relations.[7] Under these circumstances we see no reason for excluding them from the bargaining unit.

We find that all employees of the Company on the plant pay roll at its Los Angeles plant, including receiving clerks, departmental clerks, route clerks, checkers, scalers, and shipping clerks, but excluding supervisory employees, subforemen, department superintendents, timekeepers, time-study men, deputized officers, all other watchmen wherever located, drivers, Kern County employees, the hide take-up gang, and all employees whose names appear on the office pay roll, constitute a unit appropriate for the purposes of collective bargaining, and that said unit will insure to employees of the Company the full benefit of their right to self-organization and to collective bargaining and otherwise effectuate the policies of the Act.

VI. The Determination of Representatives

The secretary-treasurer of the Amalgamated testified that on November 1, 1939, it represented 587 employees in the appropriate unit, of whom 530 were Amalgamated members in good standing. The P. W. O. C. introduced in evidence 369 member-

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[7]These employees were covered by the documents exchanged between the Company and the Amalgamated in November of 1938 and 1939, which we have assumed, without deciding, constituted contracts.

ship cards.[8] Of these cards, 18 were signed after November 1, 1939, and 15 were signed by persons not employed during the pay-roll period of October 31, 1939. There thus remain 336 cards signed by employees in the appropriate unit on or before November 2, 1939.[9] About 300 signers of P. W. O. C. membership cards are also claimed as members by the Amalgamated. Disregarding the approximately 300 employees who are claimed as members by both the P. W. O. C. and the Amalgamated, there remain of the 587 employees whom the Amalgamated claims to represent about 287 who are not also claimed as members by the P. W. O. C.

According to the testimony of the plant superintendent there were about 675 employees in the appropriate unit on November 1, 1939. The plant pay roll of October 21, 1939, however, shows a total of 857 names. We are unable to determine how many of these were in the appropriate unit, since we are unable to decipher many of the marks designating the work classifications of the employees on

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[8]Twenty-seven additional cards were marked for identification, but they were not introduced in evidence because the P. W. O. C. had agreed with the signers not to divulge their names.

[9]Some undated cards were, according to his testimony, dated by the P. W. O. C. Director the day they came into his hands and, therefore, do not necessarily bear the date when they were signed. There is testimony to the effect that a few cards were signed in 1938 before the consent election.

this list. We can determine that at least 34 employees were not in the unit, leaving 823. It is entirely possible that a substantial number of [28] these 823 employees were not in the unit. In any event, whether there were 675 or 823 employees in the appropriate unit on November 1, 1939, it is plain that the Amalgamated has not shown that it represented a majority of the employees on November 1, 1939, in view of the overlapping membership claim and showing of the P. W. O. C. On the other hand, the P. W. O. C. has made a sufficient showing to rebut both the showing of majority representation by the Amalgamated and any presumption, arising by virtue of its victory in the consent election of October 1938, of continuing majority representation by the Amalgamated on November 2, 1939.

We find that an election by secret ballot is necessary to resolve the question concerning representation among the employees of the Company at its Los Angeles, California, plant and we shall direct the holding of such an election. We will direct that those eligible to vote in the election shall be those employees in the appropriate unit who were employed during the pay-roll period immediately preceding the date of this Direction of Election, including employees who did not work during that pay-roll period because they were ill or on vacation or were then or have since been temporarily laid off, and excluding those who have since quit or been discharged for cause. The P. W. O. C. requested

that the name of its local union should appear on the ballot. This request is hereby granted.

Upon the basis of the above findings of fact and upon the entire record in the case, the Board makes the following:

CONCLUSIONS OF LAW

1. A question affecting commerce has arisen concerning the representation of employees of Cudahy Packing Company, Los Angeles, California, within the meaning of Section 9 (c) and Section 2 (6) and (7) of the National Labor Relations Act.

2. All employees of the Company on the plant pay roll of its Los Angeles, California, plant, including receiving clerks, departmental clerks, route clerks, scalers, checkers, and shipping clerks, but excluding supervisory employees, subforemen, department superintendents, timekeepers, time-study men, deputized officers, all other watchmen wherever located, drivers, Kern County employees, hide take-up gang, and all employees whose names appear on the office pay roll, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the National Labor Relations Act.

DIRECTION OF ELECTION

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, [29] and pursuant to Article III, Section 8, of National

Labor Relations Board Rules and Regulations—Series 2, as amended, it is hereby

Directed that, as part of the investigation authorized by the Board to ascertain representatives for the purposes of collective bargaining with Cudahy Packing Company, Los Angeles, California, an election by secret ballot shall be conducted as early as possible, but not later than thirty (30) days from the date of this Direction of Election, under the direction and supervision of the Regional Director for the Twenty-first Region, acting in this matter as agent for the National Labor Relations Board, and pursuant to Article III, Section 9, of said Rules and Regulations, among all employees of the Company on the plant pay roll at its Los Angeles plant, who were employed during the pay-roll period immediately preceding the date of this Direction of Election, including receiving clerks, departmental clerks, route clerks, scalers, checkers, and shipping clerks, and including employees who did not work during that pay-roll period because they were ill or on vacation or were then or have since been temporarily laid off, but excluding supervisory employees, subforemen, department superintendents, timekeepers, time-study men, deputized watchmen, all other watchmen wherever located, drivers, Kern County employees, the hide take-up gang, and all employees whose names appear on the office pay roll, and those who have since quit or been discharged for cause, to determine whether said employees desire to be represented by United

Packing House Workers of America, Local No. 107, C. I. O., or Amalgamated Meat Cutters and Butcher Workmen of North America, A. F. of L., Local No. 207, for the purposes of collective bargaining, or by neither.

[Endorsed]: Filed Jul. 29, 1940. [30]

EXHIBIT "B"

United States of America
Before the National Labor Relations Board

Case No. R-1718

In the Matter of
CUDAHY PACKING COMPANY

and

PACKING HOUSE WORKERS ORGANIZING COMMITTEE, C. I. O.

CERTIFICATION OF REPRESENTATIVES
June 6, 1940

On April 16, 1940, the National Labor Relations Board, herein called the Board, issued a Decision and Direction of Election in this proceeding.[1] Pursuant to the Direction of Election, an election by secret ballot was conducted on May 16, 1940, under the direction and supervision of the Regional

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[1] 22 N. L. R. B. No. 83.
24 N. L. R. B., No. 32.

Director for the Twenty-first Region (Los Angeles, California). On May 17, 1940, the Regional Director, acting pursuant to Article III, Section 9, of National Labor Relations Board Rules and Regulations—Series 2, as amended, issued and duly served on the parties an Election Report. No objections to the conduct of the ballot or the Election Report have been filed by any of the parties.

As to the balloting and its results, the Regional Director reported as follows:

1. Total number eligible 847
2. Total number of ballots cast 721
3. Total number of challenged ballots 2
4. Total number of blank ballots 2
5. Total number of void ballots 0
6. Total number of valid ballots cast 717
7. Total number of votes for Amalgamated Meat Cutters and Butcher Workmen of North America, Local 207, affiliated with A. F. L. 285
8. Total number of votes for United Packing House Workers of America, Local 107, affiliated with the C. I. O. 410
9. Total number of votes for neither 22

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of National Labor Relations Act, 49 Stat. 449, and pursuant to Article III, Sections 8 and 9, of National Labor Relations Board Rules and Regulations—Series 2, as amended,

It is hereby certified that United Packing House Workers of America, Local No. 107, C. I. O., has been designated and selected by a majority of all employees of Cudahy Packing Company, Los Angeles, California, on the plant pay roll of its Los Angeles, California, plant, including receiving clerks, departmental clerks, route clerks, scalers, checkers, and shipping clerks, but excluding supervisory employees, [31] subforemen, department superintendents, timekeepers, time-study men, deputized officers, all other watchmen, wherever located, drivers, Kern County employees, hide take-up gang, and all employees whose names appear upon the office pay roll, as their representative for the purposes of collective bargaining and that, pursuant to Section 9 (a) of the National Labor Relations Act, United Packing House Workers of America, Local No. 107, C. I. O., is the exclusive representative of all such employees for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

[Endorsed]: Filed Jul. 29, 1940. [32]

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS COMPLAINT

Please take notice that the annexed motion to dismiss the complaint will be brought on before

this Court on July 30, 1940, at 10 o'clock A. M. or as soon thereafter as can be heard, in the Court Room of the Honorable Leon R. Yankwich, in the United States Post Office Building, in the City and County of Los Angeles, State of California.

WM. R. WALSH,

Regional Attorney 21st Region, appearing for Defendant Walter P. Spreckels, individually, and as Regional Director, 21st Region of the National Labor Relations Board, 808 U. S. Post Office & Court House, Los Angeles, California.

To: Messrs. W. I. Gilbert
and
Redmond S. Brennan
Attorneys for Plaintiff,
939 Rowan Building
Fifth and Spring Streets,
Los Angeles, California.

[Endorsed]: Filed Jul. 29, 1940. [33]

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

I. The complaint must be dismissed for lack of jurisdiction of an indispensable party.

A. The matters sought to be enjoined are those which only the National Labor Relations Board

can perform and not this defendant Spreckels, as a subordinate agent.

National Labor Relations Board Section 9(c) Rules and Regulations of the National Labor Relations Board—Series 2, as amended, Articles II and IV.

B. The District Court has no jurisdiction over the National Labor Relations Board, as no suit can be brought against any branch of the United States Government without special Act of Congress.

National Labor Relations Act, Sections 3 and 5

Jamestown Veneer & Plywood Corp. v. National Labor Relations Board, 13 F. Supp. 405 (N.D.N.Y.);

New England Transportation Co. v. Myers, 15 Supp. 807. (D. Mass).

And were such suit even capable of being brought it would only be in the District of Columbia, where the Board is officially located.

National Labor Relations Act, Sections 3 and 5 [34]

Jamestown Veneer & Plywood Corp. v. National Labor Relations Board, 13 F. Supp. 405 (N.D.N.Y.);

New England Transportation Co. v. Myers, 15 Supp. 807 (D. Mass.).

C. The complaint must therefore be dismissed for want of jurisdiction over an indispensable party.

Moore v. Anderson, 68 F. (2d) 191, 193 (CCA 9, 1933);

Raichie v. Federal Reserve Bank, (C.C.A. 2) 34 F. (2d), 910, 916;

Generich v. Ritter, 265 U. S. 388, 391-2;

Webster v. Fall, 266 U. S. 507;

Alcohol Warehouse Corp. v. Canfield (C. C. A. 2) 11 Fed. (2d) 214, 215;

National Conference on Legalizing Lotteries v. Goldman, 85 F. (2d) 66, 67 (C. C. A. 2, 1936);

Association for Legalizing American Lotteries v. Goldman, 85 F. (2d) 67 (C. C. A. 2, 1936);

Golden States Advertising Co. v. Goldman, 85 F. (2d) 68 (C. C. A. 2, 1936);

Warner Valley Stock Co. v. Smith, 165 U. S. 28.

II. All the powers, duties and functions of the defendant Spreckels in the proceeding complained of have been fully discharged and performed, and there is nothing else which he can do or perform. The bill must therefore be dismissed on the ground of mootness.

National Labor Relations Act, Section 9

Rules and Regulations of the National Labor Relations Board, Articles II, Article IV.

III. The United States District Court is without jurisdiction of the subject matter of the bill of complaint herein.

A. Under the terms and provisions of the National Labor Relations Act, the matters set forth in the bill of complaint are within the exclusive jurisdiction of the National Labor Relations Board in the first instance, subject to review, after the rendition of a final order of the Board, by the United States Circuit Court of Appeals.

National Labor Relations Act, Section 9 (c) and (d); Section 10 (a), (b), (c), (d), (e), and (f), 29 U. S. C. A., §159 (c) and (d), §160 (a), (b), (c), (d), (e) and (f);

Myers v. Bethlehem Shipbuilding Corp., Ltd., 303 U. S. 41; [35]

Newport News Shipbuilding & Drydock Co. v. Bennet P. Schauffler, et al., 303 U. S. 54;

Carlisle Lumber Co. v. Hope (C.C.A. 9) 83 F. (2d) 92;

Bradley Lumber Co. of Ark. et al. v. National Labor Relations Board, 84 F. (2d) 97 (C.C.A. 5), cert. den. 299 U. S. 559;

E. I. DuPont de Nemours & Co. and Dupont Rayon Co. v. Boland, 85 F. (2d) 12 (C. C. A. 2);

B. This Court has passed on this question in the following cases:

Bethlehem Shipbuilding Corp. v. Nylander, 14 F. Supp. 201 (Stephens, J.);

Aircraft Workers Union, Inc. v. Nylander (S. D. Calif. Yankwich, J.) Decided August 18, 1937, No. 1230-M;

Northrup Corporation v. Nylander, (S. D. Calif. Yankwich, J.) Decided August 18, 1937, No. 1235-H;

Amalgamated Meat Cutters & Butcher Workmen of North America, Local No. 207 v. National Labor Relations Board and Walter P. Spreckels, Regional Director, 21st Region, (S. D. Calif. Harrison, J.) Decided July 12, 1940, No. 1052-H;

The last of these cases was sought to be maintained on a bill of complaint identical with the present bill except that the Board was made a party defendant and Spreckels was sued as director only.

IV. The United States District Court has no jurisdiction in equity to enjoin proceedings of the National Labor Relations Board under the National Labor Relations Act.

A. The bill of complaint fails to set forth facts showing that the plaintiff is threatened with irreparable damage cognizable in equity as a result of the proceedings sought to be enjoined.

Howard Myers, et al. v. Bethlehem Shipbuilding Corp., Ltd., 303 U. S. 41;

Newport News Shipbuilding & Dry Dock Co. v. Bennet F. Schauffler, et al., 303 U. S. 54;

Carlisle Lumber Co. v. Hope (C. C. A. 9) 83 F. (2d) 92; [36]

Bradley Lumber Co. of Ark., et al. v. National Labor Relations Board, 84 F. (2d) 97 (C. C. A. 5), cert. den. 299 U. S. 559;

E. I. DuPont de Nemours & Co. and Dupont Rayon Co. v. Boland, 85 F. (2d) 12 (C. C. A. 2);

Heller Bros. Co. v. Lind, et al., 86 F. (2d) 862 (Ct. App. D. C.), cert. den. 300 U. S. 672.

B. The procedure of the National Labor Relations Act, by its terms, affords a full, adequate, and complete administrative remedy for any of the matters complained of in the bill, which plaintiff has failed to exhaust.

Howard Myers, et al. v. Bethlehem Shipbuilding Corp., Ltd., supra;

Newport News Shipbuilding & Drydock Co. v. Bennet F. Schauffler, et al., 91 F. (2d) 730 (C. C. A. 4), affirmed by Supreme Court, 303 U. S. 54;

Carlisle Lumber Co. v. Hope, supra;

Heller Bros. Co. v. Lind, et al., supra;

Bradley Lumber Co. of Ark., et al. v. National Labor Relations Board, supra.

C. The certification is not a command or order of any kind, and is not properly the subject of an injunction. Los Angeles R. R. Co. v. United States, 273 U. S. 299. Should it later become the basis of

an order against the Cudahy Packing Company under Section 10 of the Act, the plaintiff would have full opportunity to intervene and contest the validity of the certification before the Board under Section 10 (b) and (c) of the Act, and thereafter before the United States Circuit Court of Appeals, on review under Section (10) (e) or (f) of the Act. The plaintiff therefore has a full, adequate and complete remedy under the Act for all of the matter complained of.

National Labor Relations Act, Section 9 (c), 9 (d), Section 10 (b), (c), (e) and (f);

Howard Myers, et al., v. Bethlehem Shipbuilding Corp., Ltd., supra; [37]

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1;

Carlisle Lumber Co. v. Hope, supra;

E. I. DuPont de Nemours & Co. and Dupont Rayon Co. v. Boland, supra.

Respectfully submitted,

WM. R. WALSH,

Regional Attorney 21st Region, appearing for defendant Walter P. Spreckels, Regional Director, 21st Region, 808 U. S. Post Office & Court House, Los Angeles, California.

[Endorsed]: Filed Jul. 29, 1940. [38]

In the District Court of the United States, Southern District of California, Central Division

No. 1076 Y Civil

AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 207,

Plaintiff,

vs.

WALTER P. SPRECKELS, individually and as Regional Director, 21st Region, of the National Labor Relations Board,

Defendant.

DECISION

Yankwich, Leon R., Judge.

The court is of the view that the complaint does not state a claim for relief within the jurisdiction of this court.

No action has been taken by the Regional Director of the National Labor Relations Board which threatens the contractual rights of the plaintiff, or justifies our interference through injunctive process.

More the National Labor Relations Act provides an exclusive method for review of the actions of the Board.

So that even if the action of this court could reach the board through a subaltern, we would be without jurisdiction.

The motion to dismiss will therefore be granted, [39] without leave to amend.

Dated this 3rd day of August, 1940.

LEON R. YANKWICH,

Judge, District Court of the United States, Southern District of California.

Counsel notified.

[Endorsed]: Filed Aug. 3, 1940. [40]

In the District Court of the United States, Southern District of California, Central Division

No. 1706 Y Civil

AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 207,

Plaintiff,

vs.

WALTER P. SPRECKELS, individually and as Regional Director, 21st Region, of the National Labor Relations Board,

Defendant.

DECREE

GRANTING THE MOTION OF WALTER P. SPRECKELS, INDIVIDUALLY AND AS REGIONAL DIRECTOR OF THE 21ST REGION OF THE NATIONAL LABOR RELATIONS BOARD, TO DISMISS AND DISMISSING THE BILL OF COMPLAINT.

This cause came on to be heard on the application of the plaintiff for a temporary injunction,

and on the motion of the defendant, Walter P. Spreckels, individually, and as Regional Director of the Twenty-first Region of the National Labor Relations Board, to dismiss the bill of complaint on the ground, first, that this is a suit to enjoin the Board and this defendant Spreckels from conducting a proceeding for the investigation and certification of representatives pursuant to Section 9(c) of the National Labor Relations Act, in which proceeding the said Board has already, after investigation, issued its certification of representatives and there is nothing further to be done by the Board or said defendant Spreckels in said proceeding; secondly, that if there were something further to be done this Court has no jurisdiction to enjoin the Board or its agents from the performance of their duties under the National Labor Relations Act; thirdly, the plaintiff has a full, adequate, and complete remedy under the procedure of the National Labor Relations Act for any of the matters complained of in the bill of complaint; and fourthly, that this suit is to enjoin acts of the Board or such acts of defendant Spreckels as he can only [41] perform under the orders and directions of the Board, and therefore the absence of jurisdiction of this Court over said Board requires the dismissal of the bill of complaint for want of an indispensable party, and

It appearing to this Court that this is a suit to enjoin said defendant Spreckels, individually and as Regional Director of the 21st Region of the Na-

tional Labor Relations Board, from conducting a certain proceeding for the investigation and certification of representatives pursuant to Section 9(c) of the Act, and that this Court is of the view that the complaint does not state a claim for relief within the jurisdiction of the Court, and that no action has been taken by the Regional Director of the National Labor Relations Board which threatens the contractual rights of the plaintiff or justifies the Court's interference through injunctive process, and that the National Labor Relations Act provides an exclusive method for review of actions of the Board, and further that this being in reality a suit to enjoin the acts of the Board or such acts of defendant Spreckels as he can only perform under the orders and directions of the Board, the Board is an indispensable party, absence of jurisdiction over whom requires a dismissal of the bill of complaint, now therefore,

On reading and filing said bill of complaint, motion to dismiss, and after hearing argument of counsel, and due deliberation having been had, it is

Ordered, adjudged, and decreed:

(1) That the motion of Walter P. Spreckels, individually, and as Regional Director of the 21st Region of the National Labor Relations Board, to dismiss the bill of complaint, be and the same is hereby granted, and the said bill of complaint is hereby dismissed without leave to amend, with costs;

(2) That application of the plaintiff for temporary injunction be and the same is hereby denied.

Dated this 13th day of August, 1940.

LEON R. YANKWICH,
United States District Judge.

No objection as to form

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Attorneys for Plaintiff.

Judgment entered Aug. 15, 1940.

Docketed Aug. 15, 1940. Book C. O. #3, page 495.

R. S. ZIMMERMAN,
Clerk.

By MURRAY E. WIRE,
Deputy.

[Endorsed]: Filed Aug. 15, 1940. [42]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given, that Amalgamated Meat Cutters & Butcher Workmen of North America, Local No. 207, plaintiff above named, hereby appeals to the Circuit Court of Appeals, for the Ninth Circuit, from the decision of the court rendered herein on August 3, 1940, and from the decree granting the motion of Walter P. Spreckels,

individually, and as Regional Director, 21st Region, of the National Labor Relations Board, to dismiss, and dismissing, the bill of complaint, rendered on the 13th day of August, 1940.

Dated: October 22, 1940.

W. I. GILBERT,
939 Rowan Building,
Los Angeles, California.
REDMOND S. BRENNAN,
Dwight Building,
Kansas City, Mo.
By W. I. GILBERT,
Attorneys for Plaintiff
and Appellant.

Received copy of the within Notice this 22 day of October, 1940.

WM. R. WALSH,
Attorney for Walter P. Spreckels, Ind. and as Regional Director, 21st Region, N. L. R. B.

[Endorsed]: Filed Oct. 22, 1940. [43]

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL

Comes now the above plaintiff and states to the court that the following points will be relied upon on appeal of this case:

I.

That an officer of the Federal Government, or a Board thereof, acting outside of the scope of authority conferred upon them by the statute creating the office, or Board, can be enjoined in a proper case.

II

The acts of an officer of the National Labor Relations Board, acting in a field and in a manner not covered by the National Labor Relations Act, do not fall within the review provisions of the National Labor Relations Act.

III.

That acts done by an officer of the National Labor Relations Board by color of office only, but in fact in contemplation of law in his private capacity, and not contemplated or authorized by the National Labor Relations Act, can be enjoined by an original action in the United States District Courts, and that [44] as to such acts the National Labor Relations Act provides no review procedure whatever.

IV.

In the case of an abuse of the power of the National Labor Relations Board, where it or its officers act by color of office only, the District Courts of the United States have original jurisdiction to give relief.

V.

Where a labor organization has been designated by the National Labor Relations Board as the duly constituted bargaining agent, and, pursuant to such

designation, makes a contract with the employer, the National Labor Relations Board is thereafter powerless, while such contract is in force and effect, to designate a new and different bargaining agent to deal on behalf of the employees with the employer, and that such an attempt is in excess of the authority conferred by statute upon the National Labor Relations Board, and constitutes the denial of due process of law under the 14th Amendment of the United States Constitution, and also an impairment of the obligation of a contract in violation of the 5th amendment to the United States Constitution.

VI.

That the interference by a third party with contractual rights existing between a labor organization and its members on the one hand, and an employer on the other, can be prevented by injunctive process where a plain, speedy and adequate remedy at law is not available.

Dated: October 22, 1940.

W. I. GILBERT
REDMOND S. BRENNAN
By W. I. GILBERT
Attorneys for Plaintiff and Appellant.

Received copy of the within Designation of Points this 22 day of October, 1940.

WM. R. WALSH
Attorney for Walter P. Spreckels, Ind. & as Reg. Director 21st Region N. L. R. B.

[Endorsed]: Filed Oct. 22, 1940. [45]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, R. S. Zimmerman, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered 1 to 48, inclusive, contain full, true and correct copies of the Complaint; Order to Show Cause; Points and Authorities in Support of Order to Show Cause; Motion to Dismiss Complaint; Notice of Motion to Dismiss Complaint; Points and Authorities in Support of Motion to Dismiss; Decision; Decree; Notice of Appeal; Statement of Points upon Which Appellant Will Rely on Appeal; Bond on Appeal; Designation of Contents of Record on Appeal, which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the Clerk's fee for comparing, correcting and certifying the foregoing record amounts to $8.65, and that same has been paid me by the Appellant.

Witness my hand and the seal of said District Court, this 5th day of November, A. D. 1940.

[Seal] R. S. ZIMMERMAN,
Clerk
By EDMUND L. SMITH
Deputy Clerk [49]

[Endorsed]: No. 9681. United States Circuit Court of Appeals for the Ninth Circuit. Amalgamated Meat Cutters & Butcher Workmen of North America, Local No. 207, Appellant, vs. Walter P. Spreckels, individually, and as Regional Director, 21st Region, of the National Labor Relations Board, Appellee. Transcript of Record upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed November 12, 1940.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 9681

AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 207,

Plaintiff, and Appellant

v.

WALTER P. SPRECKELS, individually, and as Regional Director, 21st Region, of the National Labor Relations Board,

Defendant, and Respondent

STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL

Comes now the above named appellant and states to this Honorable Court that on appeal it will rely

upon the same points which have heretofore been filed in the District Court of the United States, Southern District of California, Central Division, and which are a part of this record on appeal.

Dated: November 7, 1940.

W. I. GILBERT
REDMOND S. BRENNAN
By [Illegible]
Attorneys for Appellant

Received copy of the within this 8th day of November, 1940.

WM. R. WALSH
Attorney for N. L. R. B.

[Endorsed]: Filed Nov. 12, 1940. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PARTS OF RECORD TO BE PRINTED

To the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit:

Appellant hereby designates, for the printing of the record, the following parts of the certified transcript of the record on appeal:

(1) Complaint, together with exhibit attached thereto;

(2) Order to show cause;

(3) Notice of motion to dismiss complaint;

(4) Motion to dismiss complaint, together with all exhibits attached thereto;

(5) Decision;

(6) Decree (Judgment)

(7) Notice of appeal;

(8) Appellant's points to be relied upon on appeal (District Court);

(9) Statement of points to be relied upon on appeal (Circuit Court);

(10) This designation of parts of record to be printed.

Dated: November 7, 1940.

W. I. GILBERT
REDMOND S. BRENNAN
By [Illegible]
Attorneys for Appellant

Received copy of the within this 8th day of November, 1940.

WM. R. WALSH
Attorney for N. L. R. B.

[Endorsed]: Filed Nov. 12, 1940. Paul P. O'Brien, Clerk.

No. 9681

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 207,

Appellant,

vs.

WALTER P. SPRECKELS, individually, and as Regional Director, 21st Region, of the National Labor Relations Board,

Appellee.

APPELLANT'S OPENING BRIEF.

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Statement of the Case.

This is an appeal from a decree of the United States District Court, Southern District of California, Central Division, dismissing plaintiff's complaint for an injunction. The reasons of the court for its action are recited in its decision [R. 56] and decree [R. 57]. All of these reasons center around the proposition that the trial court had no jurisdiction over the cause.

Statement of Facts and Pleadings Disclosing Basis of Jurisdiction.

The pleadings show plaintiff to be a labor organization affiliated with the American Federation of Labor. The defendant is sued both individually and in his official capacity as Regional Director of the 21st Region of the National Labor Relations Board (hereinafter referred to as the Board) [R. 3]. The allegations are in substance as follows:

In October, 1938, plaintiff was certified as the exclusive bargaining agent for the employees of the Cudahy Packing Company (hereinafter referred to as the Employer). This certification was in consequence of a consent election held under the auspices of the National Labor Relations Board. Pursuant to this election and certification, plaintiff made a contract with the employer. A renewal of it was in effect at the time the acts alleged in the complaint were committed. It was in effect also when the complaint was filed, and [containing an automatic renewal provision, R. 16] it is in effect now.

This existing contract, it is alleged, was wrongfully interfered with by the defendant Spreckels [R. 3]. It is stated that the defendant Spreckels purported to act as regional director of the National Labor Relations Board, but in fact acted in excess of his authority as regional director. The acts committed by him, according to the complaint, fall into several classes.

First: He wrongfully intimidated the employer and the employees from living up to the contract, which the complaint alleges was in force;

Second: He wrongfully notified the employees and the employer in effect that the contract between the plaintiff and the employer was void, bringing about this effect:

(a) By publishing notices of purported hearings before the regional office of the Labor Board;

(b) By publishing notices of a purported election;

(c) By authorizing and encouraging Harry Bridges and the C. I. O. to declare to the employees of the plant that the existing contract was void, and that the National Labor Relations Board and the defendant Spreckels would select an exclusive bargaining agent for the employees;

Third: He made representations to the National Labor Relations Board, pursuant to which that Board took steps in violation of plaintiff's contract rights, and ordered an election, and made statements notifying the employees that the plaintiff was not the legally constituted bargaining agent [R. 5];

Fourth: He encouraged and urged the rival union, after March 14, 1940, while plaintiff's contract with the employer was still in force and effect, to negotiate a new contract.

All of these acts, it is alleged, were done with the intent of causing plaintiff to lose members, dues and prestige, and compelling the plaintiff to resort to legal action, and to expend sums of money. It is further stated that these acts did cause loss of members, dues and prestige and the expense of attorney's fees, and will continue to cause such detriments, for all of which there is no plain, speedy or adequate remedy at law [R. 7].

A. Basis of Jurisdiction of the District Court.

The questions raised by this state of facts can be resolved only by an interpretation of the scope of the National Labor Relations Act, and the authority vested by virtue of that act in a subordinate officer of the National Labor Relations Board. Therefore, the controversy—irrespective of the amount involved—falls within the provision of *United States Code Annotated,* Title 28, Section 41, Subdivision 8, which reads:

> "The District Court shall have original jurisdiction as follows:
>
> . . . . . .
>
> (8) Of all suits and proceedings arising under any law regulating commerce."

A possible alternative ground for jurisdiction that would have been available to plaintiff if the complaint had not been dismissed is that a Federal question is involved. *U. S. C. A.*, Title 28, Sec. 41, Subsec. (1). The complaint in question does not state a jurisdictional amount, but it is plain from the allegations of the complaint, and from the number of members involved and affected, that the requisite jurisdictional amount could have been made to appear.

B. Jurisdiction of the Circuit Court of Appeals to Review the Decision in Question.

This Honorable Circuit Court has jurisdiction to review the judgment under United States Code Annotated, Title 28, Paragraph 225(a), Subdivision (1), for the reason that the decision of the District Court is a final decision of the District Court, not subject to a direct review in the Supreme Court of the United States, under Section 345 of Title 28.

Questions Involved.

The basic question is: Does either an officer, purporting to act for and on behalf of, or under the direction of the National Labor Relations Board, or an individual by color of such office, have the authority under the National Labor Relations Act to do any acts tending to abrogate an existing and valid contract between a labor union and an employer, if that labor union has been previously certified by the National Labor Relations Board to be the properly constituted bargaining agent for the employees, and if the contract made pursuant to such certification is in force and effect, and where there is no claim that either the contract or the election itself are the result of unfair labor practices?

The subsidiary questions arising out of the main problem are:

1. May an officer of the Board be enjoined from committing *ultra vires* acts, or is he, if he acts under the immediate direction or supervision of the Board, free from injunctive process, even though both he and the Board have no authority under the statute to do the acts complained of?

2. Can the court enjoin an agent of the Board from doing acts outside of the scope of his office or authority?

3. Where an agent of the Board lacks statutory power and jurisdiction to do the acts complained of, and where there is not involved an erroneous decision of the agent within his existing or conceded jurisdiction, must the plaintiff pursue the administrative remedies provided by the Act, and if there are none covering his case can he find relief in a court of equity upon a showing of irreparable injury?

Outline of the Argument.

In the ensuing argument we shall discuss the following points in the order stated:

(1) Plaintiff, although an unincorporated labor association, has the right to maintain suits in the Federal Courts;

(2) An officer of the United States government, who acts outside and beyond the scope of his authority, can be enjoined;

(3) A suit against an officer, under the conditions stated in point (2) is not a suit against the United States or a governmental agency;

(4) An officer of the Board has no power, under the National Labor Relations Act, to do acts interfering with validly existing contracts, either by acts *colore officio,* or by acts entirely outside any power of his office;

(5) Defendant's acts being outside the scope of the authority conferred upon him by statute, the review provisions of the statute are inapplicable;

(6) The District Courts of the United States have general jurisdiction to enjoin the Board, or its officers, from committing acts unauthorized by the National Labor Relations Act;

(7) A suit against a subordinate officer of the Board to enjoin him from doing acts not authorized by statute is not in effect a suit against the Board. Such Board is not an indispensible party defendant, because the doctrine of *respondeat superior* does not apply to subordinate agents of the government.

I.

Plaintiff, Although an Unincorporated Labor Association, Has the Right to Maintain Suits in the Federal Courts.

(1) The plaintiff, a labor union, though an unincorporated association, may be sued and sue in its own name.

Rule 17(b), *Federal Rules of Civil Procedure;*

United Mine Workers of America v. Coronado Coal Co., 259 U. S. 344; 42 S. C. 570; 66 L. Ed. 975; 27 A. L. R. 762;

Alston v. School Board City of Norfolk (C. C. A. 4, 1940), 112 Fed. (2d) 992.

(2) The failure on the part of defendant to raise an objection to plaintiff's capacity to sue in the trial court constitutes a waiver of any objection of plaintiff's capacity, and the objection may not be raised for the first time on appeal.

4 *Amer. Jur.*, Associations, par. 50;

27 A. L. R. 790;

Franklin Union v. People, 220 Ill. 355; 77 N. E. 176; 4 L. R. A. (n. s.) 1001.

II.

An Officer of the United States Government, Who Acts Outside and Beyond the Scope of His Authority, Can Be Enjoined.

There is unimpeachable authority to the effect that if the statute authorizes an officer of the government or a governmental board, to do certain acts, the authority and power of such officer or board is measured by the language of the Act, and any attempt to do acts not authorized by the Act in question constitutes a violation of official duty, and places the officer in a position where the law considers his unauthorized acts as those of an individual rather than those of an officer of the government. In such cases, and under such conditions, the unauthorized act of the officer, if it interferes with the rights and property of citizens will be enjoined by courts of equity.

Waite v. Macy, 246 U. S. 606; 38 S. C. 395; 62 L. Ed. 892, 895:

> "The Secretary and the board must keep within the statute (Merritt v. Welsh, 104 U. S. 694, 26 L. ed. 896), which goes to their jurisdiction (see Interstate Commerce Commission v. Northern P. R. Co., 216 U. S. 538, 544, 54 L. ed. 608, 609, 30 Sup. Ct. Rep. 417), and we see no reason why the restriction, should not be enforced by injunction, as it was, for instance, in Bacon v. Rutland R. Co., 232 U. S. 134, 58 L. ed. 538, 34 Sup. Ct. Rep. 283; Philadelphia Co. v. Stimson, 223 U. S. 605, 620, 56 L. ed. 570, 576, 32 Sup. Ct. Rep. 340; Santa Fe P. R. Co.

v. Lane, 244 U. S. 492, 61 L. ed. 1275, 37 Sup. Ct. Rep. 714. We are satisfied that no other remedy, if there is any other, will secure the plaintiff's rights."

Philadelphia Co. v. Stimson, Secretary of War, 223 U. S. 605; 32 S. C. 340; 56 L. Ed. 570.

Colorado v. Toll, Superintendent of Rocky Mountain Park, 268 U. S. 228; 45 S. C. 505; 69 L. Ed. 927, 929:

"The object of the bill is to restrain an individual from doing acts that it is alleged that he has no authority to do, and that derogate from the quasi sovereign authority of the state. There is no question that a bill in equity is a proper remedy, and that it may be pursued against the defendant without joining either his superior officers or the United States. Missouri v. Holland, 252 U. S. 416, 431, 64 L. ed. 641, 646, 11 A. L. R. 984, 40 Sup. Ct. Rep. 382; Philadelphia Co v. Stimson, 223 U. S. 605, 619, 620; 56 L. ed. 570, 576, 577; 32 Sup. Ct. Rep. 340."

Noble, Secretary of the Interior v. Union River Logging Co., 147 U. S. 165, 13 S. C. 271, 37 L. Ed. 123, 127. This case arose under a bill of equity by the Union River Logging Company to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from executing a certain order revoking the approval of the plaintiff's map for a right of way over public lands, and from molesting plaintiff in the enjoyment of such right of way secured to it under an Act of Congress.

The court, after considering the matter, ordered a decree for the plaintiff. An injunction as prayed for in the

bill was issued against the officer. Upon appeal it was held that since the Secretary of the Interior had no power to revoke the act of his predecessor, the injunction was properly issued. The court said at page 127:

> "The lands over which the right of way was granted were public lands subject to the operation of the statute, and the question whether the plaintiff was entitled to the benefit of the grant was one which it was competent for the Secretary of the Interior to decide, and when decided, and his approval was noted upon the plats, the first section of the Act vested the right of way in the railroad company. The language of that section is 'that the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or territory,' etc. The uniform rule of this court has been that such an Act was a grant *in praesenti* of lands to be thereafter identified. Denver & R. G. R. Co. v. Alling, 99 U. S. 463. (25; 438). The railroad company became at once vested with a right of property in these lands, of which they can only be deprived by a proceeding taken directly for that purpose. If it were made to appear that the right of way had been obtained by fraud, a bill would doubtless lie by the United States for the cancellation and annulment of an approval thus obtained. Moffat v. United States, 112 U. S. 24 (28; 623); United States v. Minor, 114 U. S. 233 (29: 110). A revocation of the approval of the Secretary of the Interior, however, by his successor in office was an attempt to deprive the plaintiff of its property without

due process of law, and was, therefore, void. As was said by Mr. Justice Grier, in United States v. Stone, 69 U. S. 2 Wall. 525, 535 (17: 765, 767): 'One officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act and requires the judgment of the court.' Moore v. Robbins, 96 U. S. 530 (24: 848). The case of United States v. Schurz, 102 U. S. 378 (26: 167) is full authority for the position assumed by the plaintiff in the case at bar. In this case the relator had been adjudged to be entitled to 160 acres of public lands; that patent had been regularly signed, sealed, countersigned and recorded; and it was held that a mandamus to the Secretary of the Interior to deliver the patent to the relator should be granted. It was said in this case by Mr. Justice Miller: 'Whenever this takes place' (that is, when a patent is duly executed) 'the land has ceased to be the land of the government, or, to speak in technical language, title has passed from the government, and the power of these officers to deal with it has also passed away.'

"It was not competent for the Secretary of the Interior thus to revoke the action or his predecessor, and the decree of the court below must, therefore, be affirmed".

These authorities show that an invalid and unauthorized act of a government officer can be enjoined.

III.

A Suit Against an Officer, Under the Conditions Stated in Point II, Is Not a Suit Against the United States or a Governmental Agency.

The cases already cited, and others of similar import, hold that a suit to enjoin an officer of the United States from doing acts unauthorized by the statutes pertaining to his office is not a suit against the United States, and therefore its consent to the suit is not required.

This was expressly so stated by Mr. Justice Hughes in *Philadelphia Company v. Stimson, Secretary of War,* 223 U. S. 605, 32 S. C. 340, 56 L. Ed. 570, 576:

> "First: If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property have been wrongfully invaded. Little v. Barreme, 2 Cranch, 170; United States v. Lee, 106 U. S. 196, 220, 221, 27 L. ed. 171, 181, 182, 1 Sup. Ct. Rep. 240; Balknap v. Schild, 161 U. S. 10, 18, 40 L. ed. 599, 601, 16 Sup. Ct. Rep. 443; Tindal v. Wesley, 167 U. S. 204, 42 L. ed. 137, 17 Sup. Ct. Rep. 770; Scranton v. Wheeler, 179 U. S. 141, 152, 45 L. ed. 126, 133, 21 Sup. Ct. Rep. 48. And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been ap-

plied with respect to state officers seeking to enforce unconstitutional enactments. Osborn v. Bank of United States, 9 Wheat. 738, 843, 868, 6 L. ed. 204, 229, 235; Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; Pennover v. McCannaughty, 140 U. S. 1, 10, 35 L. ed. 363, 365, 11 Sup. Ct. Rep. 499; Scott v. Donald, 165 U. S. 107, 112, 41 L. ed. 648, 653, 17 Sup. Ct. Rep. 262; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Ex parte* Young, 209 U. S. 123, 159 160, 52 L. Ed. 714, 728, 729, 13 L. R. A. (N. S.) 932, 28 Sup. Ct. Rep. 441, 14 A & E Ann. Cas. 764; Ludwig v. Western U. Teleg. Co., 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280; Herndon v. Chicago R. I. & P. R .Co., 218 U. S. 135, 155, 54 L. Ed. 970, 976, 30 Sup. Ct. Rep. 633; Hopkins v. Clemson Agri. College, 221 U. S. 636, 643-645, 55 L. ed. 890, 894, 895, 35 L. R. A. (N. S.) 243, 31 Sup. Ct. Rep. 654. And it is equally applicable to a Federal Officer acting in excess of his authority or under an authority not validly conferred. Noble v. Union River Logging R. Co., 147 U. S. 165, 171, 172, 37 L. Ed. 123, 125, 126, 13 Sup. Ct. Rep. 271; American School v. McAnnulty, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33.

"The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States."

The same holding is found in *Work, Secretary of Interior v. Louisiana*, 269 U. S. 250, 46 S. C. 92, 70 L. Ed. 259, 263:

> "It is clear that if this order exceeds the authority conferred upon the Secretary by law and is an illegal act done under color of his office, he may be enjoined from carrying it into effect. Noble v. Union River Logging R. Co., 147 U. S. 165, 171, 172, 37 L. ed. 123, 125, 126, 13 Sup. Ct. Rep. 271; Garfield v. United States, 211 U. S. 249, 261, 262, 53 L. ed. 168, 174, 175, 29 Sup. Ct. Rep. 62; Lane v. Watts, 234 U. S. 525, 540, 58 L. ed. 1440, 1456, 34 Sup. Ct. Rep. 965; Payne v. Central P. R. Co., 255 U. S. 228, 238, 65 L. ed. 598, 603, 41 Sup. Ct. Rep. 314; Santa Fe P. R Co.. v. Fall, 259 U. S. 197, 199, 66 L. ed. 896, 897, 42 Sup. Ct. Rep. 466; Colorado v. Toll, 268 U. S. 228, 230, 69 L. ed. 927, 929, 45 Sup. Ct. Rep. 505. A suit for such purposes is not one against the United States, even though it still retains the legal title to the lands, and it is not indispensable party. Garfield v. United States, 211 U. S. 260, 262, 53 L. ed. 174, 29 Sup. Ct. Rep. 62; Lane v. Watts, 234 U. S. 540, 58 L. ed. 1456, 34 Sup. Ct. Rep. 965."

IV.

An Officer of the Board Has No Power, Under the National Labor Relations Act, to Do Acts Interfering With Validly Existing Contracts, Either by Acts Colore Officio, or by Acts Entirely Outside Any Power of His Office.

The defendant Spreckels has no power, either by color of his office as a subordinate of the Board, or as an individual, to interfere with or to seek to abrogate the existing contract between the plaintiff and the employer.

The complaint alleges two types of acts of interference on the part of the defendant.

The first type of acts embraces the extra-jurisdictional statements, encouragements and proddings by the defendant Spreckels and his agents and employees suggesting to the C. I. O. and to Harry Bridges, to treat the existing contract as void, and to negotiate a new one.

The other type of acts consist of the wrongful use of the machinery set up by the National Labor Relations Act, to interfere with or defeat the existing contract of the plaintiff.

(1) As to the first type of acts, it is plain that the National Labor Relations Act nowhere authorizes either the Board, or an officer thereof, to encourage or favor one labor organization over the other, to express an opinion on the validity of existing contracts, or to invite or suggest action in conformance with the defendant's individual preference of organizations. Nor may he, while the purported decision of the Board presumes, without deciding, that the agreement of October 24, 1939, constitutes a contract [R. 38] state that it is void in his opinion, and should

be replaced by a new one which the C. I. O. should negotiate at once.

If, by way of example, a judicial officer assumed in a judicial proceeding, without deciding, that a certain document was valid, and if he then got in touch with an interested party and suggested that in his opinion the document was void and a new one should be negotiated, we would find such conduct highly reprehensible. In fact, it is almost inconceivable that this should occur at all. While there may be some question as to a litigant's right to enjoin the judge in that event, similar reasons of policy do not prevent a suit against an administrative officer who, as we have seen, can clearly be enjoined, if he acts outside of the scope of his authority.

(2) With respect to the second type of acts plaintiff does not urge that the mere existence of a contract presents, abstractly, a bar to an election or to certification proceedings It appears that the courts have not yet stated whether an election can be held while an honest contract is in effect.

If that power exists at all, there must be a *bona fide* election. The proceedings cannot be made to serve the purpose of undermining the existing honest contract. Proceedings under Section 9c* cannot be resorted to for the purpose of emasculating the force of the contract or of causing the collapse of the previously certified bargaining unit that made it.

That the motive of the defendant in causing the machinery of the act to be set in motion was exactly that of choking off the life of the contract is, in substance, but

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*Pertinent provisions of the Act are set out in the Appendix hereto.

nevertheless plainly, alleged. That these allegations are not idle fancy appears from a comparison of the policy of the Board in general on such matters with the result of these purported proceedings.

While the Board has held that the existence of a contract cannot prevent the exercise of its power to conduct certification proceedings,

> *American West-African Line, Inc.*, 4 N. L. R. B. 1086;
>
> *Malone Aluminum Corp. Inc.*, 19 N. L. R. B. No. 52,

it has also plainly stated that *in spite of certification proceedings an existing contract continues unabated.* In *New England Transportation Co.*, 1 N. L. R. B. 130, it is said:

> "The whole process of collective bargaining and unrestricted choice of representatives assumes the freedom of the employees to change their representatives, *while at the same time continuing the existing agreements under which the representatives must function.* The National Mediation Board has clearly stated this principle in the following words:
>
> "(2) Change of representatives under existing agreements.—Where there is an agreement in effect between carrier and its employees signed by one set of representatives and the employees choose new representatives who are certified by the Board, the Board has taken the position that *a change in representation does not alter or cancel any existing agreement made in behalf of the employees by these previous representatives.* The only effect of a certification by the Board is that the employees have chosen other agents to represent them in dealing with the management

under the existing agreement. If a change in the agreement is desired, the new representatives are required to give due notice of such desired change as provided by the agreement or by the Railway Labor Act. Conferences must then be held to agree in the changes exactly as if the original representatives had been continued." (Italics supplied.)

While this right of holding elections irrespective of existing contracts is claimed by the Board to be unlimited as long as there is a dispute concerning representation, it has been exercised only under a restricted set of conditions. They are summarized as follows by Joseph Rosenfarb, attorney for the Board, in his book "The National Labor Policy," pages 267-268:

"The general rule then, as modified by the factor of time, may be stated as follows: Where the unexpired duration of the agreement is short the board will not disturb the contractual relationship, but where the existing exclusive contract has a long time to run, it will not be a bar to a choice of representatives. What duration of the contract is or is not a bar to determination is a matter which may vary under the circumstances of each case.

"The Board has apparently come to adopt the rule that *it will not proceed with an investigation of representatives during the existence of a contract of a year's duration until the time when the contract is about to expire.* 'The duration of the contract,' said the Board in National Sugar Refining Co. of N. J., 'is not for such a long period as to be contrary to the purposes and policies of the Act.' The dissent of Edwin S. Smith is predicated upon the argument that the employees shall not be denied the right to change

their representatives where the last determination, in this case by a consent election, occurred more than a year before.

"One of the A. F. of L. proposals for amendment provides that:

"Change of membership in or of affiliation with or withdrawal from a labor organization should not impair the rights conferred by this Act on such exclusive bargaining agent until either (1) the term of any written contract made by it with an employer has expired or (2) one year from the date of execution of such contract (where the contract extends beyond one year) has elapsed, whichever is first reached. Such labor organization shall have an interest in its own right in said contract for said period.

"*This provision apparently seeks to enact into law the present position of the Board on the issue.*" (Italics supplied.)

These observations are not offered for the purpose of suggesting that under its declared policy the Board should not have acted the way it did. They are made in order to show that plaintiff has a substantial basis for its allegation that the mainsprings of this controversy were the extra-jurisdictional motives of the defendant.

This shows, then, that proceedings under Section 9c of the Act must stop short of any inference with valid and existing contracts.

Nor may the power of the Board under Section 9c be exercised in such a fashion as to nullify or abrogate such contract rights, since such conduct on the part of the administrative officer would violate the requirement of due process, not only for aiming at the cancellation of a contract under the guise of an election proceeding with-

out giving the parties affected any notice of the true purpose of the alleged official action, but also because *unfairness of administrative officers in the performance of their administrative functions violates the due process clause.*

See Annotation in 98 A. L. R. 411.

This is not a case where a contract between the employer and the bargaining unit has come about by unfair labor practices. In such an event interference by the Board with the purported contract falls under the head of prevention of unfair labor practices. Proceedings of such a nature are authorized under Section 10 of the Act. By reason of the fact that Section 10 refers back to Section 8, such proceedings are directed exclusively against employers. Incident to Board proceedings a contract obtained by unfair labor practices can be ordered to be cancelled. This was recently determined in *Inter-Association of Machinists v. National Labor Relations Board,* 85 L. Ed. 5.

We have been unable to find any case in which the Board has interferred with or nullified a collective bargaining agreement *except where the contract itself was the result of unfair labor practices.*

Since the acts of the administrative officer in our case were in excess of his statutory jurisdiction they are void.

Kansas Home Ins. Co. v. Wilder, 43 Kan. 731; 23 Pac. 1061;

Gonzales v. Williams, 192 U. S. 1, 24 S. Ct. 177; 48 L. Ed. 317;

Ng Fung Ho v. White, 249 U. S. 276, 42 S. Ct. 492; 66 L. Ed. 938;

United States v. Tod, 263 U. S. 149; 44 S. Ct. 54; 68 L. Ed. 221.

V.

Defendant's Acts Being Outside the Scope of the Authority Conferred Upon Him by Statute, the Review Provisions of the Statute Are Inapplicable.

The discussion so far has shown that the acts of the defendant are not within the powers conferred upon him or the Board by the National Labor Relations Act, and that they must therefore be considered as the acts of the defendant as an individual.

Now, the Act contains no provision for the review or prevention of acts by the Board or its officers outside the scope of their powers as conferred by the Act. The review procedure of Section 10 contemplates and requires an order of the Board. Only an order can be reviewed by appropriate proceedings, to wit, a petition for enforcement or review, as the case may be, to a United States Circuit Court of Appeals. It has been expressly held that the certification of an employee group as the legally constituted bargaining agent is not an order, and that, therefore, the certification cannot be reviewed.

> *American Federation of Labor v. National Labor Relations Board,* 308 U. S. 400; 84 L. Ed. 347.

Incidentally, this case suggests (84 L. Ed., at p. 354) that the court is not deciding whether the action of the Board in certifying an employee unit as the properly constituted bargaining representative can be reviewed by independent suit. This question is expressly left open.

It can be readily seen that for a very grave injustice or injury resulting from the unwarranted interference with its contract under the guise of an election proceeding an employee unit such as the plaintiff, is entirely without administrative or other legal remedy. As already pointed out, a certification proceeding does not in and of itself result in an order. It is only after the employer refuses to bargain with the unit certified to it that the Board can issue an order of compliance. Not until then is there a subject for review by the Circuit Court of Appeals. It is conceivable, and in the instant case evident, that if the employer does not refuse to act pursuant to the certification in question, an order directing the employer to comply can never result. Therefore, there will never be an order with respect to which the review provisions of the National Labor Relations Act can be called into operation. The improperly ousted unit is simply helpless under the Act. That is why the remedy provided by the statute is inadequate. For that reason equity must step in and fill the gap, especially when the complaint is not directed against the certification proceeding as such but against defendant's unauthorized and unwarranted interference with plaintiff's contract which, according to the allegations of the complaint, is continuous.

There can be no question that the loss of prestige, loss of membership and inability to administer its trust to its members constitute an actual and irreparable injury to the plaintiff which cannot be properly measured in damages. In fact, the only element which can be approxi-

mated by figures is the amount of dues lost by the plaintiff because of the wrongful acts of the defendant, and the amount of expenses to which the plaintiff has been put by reason of the unlawful acts.

No other remedy except injunctive relief is effective or even available in this case. As the situation now stands, the employer will not do anything on which an order against it, under Section 10 of the Act, may be forthcoming.

If the employer refuses to continue to bargain with the plaintiff—which it in fact is doing—the plaintiff has no remedy under the Act which is effective, or which it can invoke, because the purported proceedings find that plaintiff is not a regularly constituted bargaining unit.

If the employer should refuse also to bargain with the C. I. O., which defendant says is the regularly constituted bargaining unit, an order might be issued under Section 10 against the employer. In that event this employer cannot say it is refusing to bargain with the C. I. O. because it still considers plaintiff the employee representative, since in fact it is also refusing to bargain with plaintiff. No review which may be had at the behest of the C. I. O. can possibly enure to the benefit of this plaintiff.

Therefore, plaintiff at this point is without any remedy whatsoever, unless equity intervenes.

VI.

The District Courts of the United States Have General Jurisdiction to Enjoin the Board, or Its Officers, From Committing Acts Unauthorized by the National Labor Relations Act.

There is no decision that appellant has been able to find which states that an officer of the National Labor Relations Board can be brought before the Circuit Court of Appeals under the review provisions of the National Labor Relations Act for exceeding the jurisdictional limitations of the Act.

As far as the defendant, as an individual, is concerned, and as far as his acts are those of an individual, the National Labor Relations Act, and its review provisions are utterly inapplicable.

The question whether official acts of the Board and its officers other than orders can be dealt with only by way of review in the Circuit Court of Appeals is still an open one. No decision can be found that an independent suit against the National Labor Relations Board, or its officers, is never possible or proper.

There have been on the contrary repeated pronouncements, dicta, it is true, on the part of the Federal Courts stating that a situation might be conceived where the ordinary equity powers of the Federal Courts could be invoked against the Board.

We call attention to the following opinions:

> *American Fed. of Labor v. National Labor Relations Board,* 84 L. Ed. 253, 259:
>
> "The Board argues that the provisions of the Wagner Act, particularly par. 9(d), have foreclosed review of its challenged action by independent suit

in the district court, such as was allowed under other acts providing for a limited court review in Chields v. Utah Idaho C. R. Co., 305 US 177, 83 L. ed. 111, 59 S. Ct. 160, and in Utah Fuel Co. v. National Bituminous Coal Commission, 306 US 56, 83 L. ed. 483, 59 S. Ct. 409; *cf.* Myers v. Bethlehem Shipbuilding Corp., 303 US 41, 82 L. ed. 638, 58 S. Ct. 459. But that question is not presented for decision by the record before us. Its answer involves a determination whether the Wagner Act, in so far as it has given legally enforceable rights, has deprived the district courts some portion of their original jurisdiction conferred by para. 24 of the Judicial Code, 28 USCA para. 41. It can be appropriately answered only upon a showing in such a suit that unlawful action of the Board has inflicted an injury on the petitioners for which the law, apart from the review provisions of the Wagner Act, affords a remedy. This question can be properly and adequately considered only when it is brought to us for review upon a suitable record."

Bethlehem Shipbuilding Corp. v. Nylander, 14 Fed. Supp. 201, 204:

". . . and there can be no presumption that these men of standing are going to embarrass complainant by attempting to pry into complainant's trade secrets (they would be irrelevant to any issue) or do other and harmful and unnecessary acts. If they do actually attempt such, *this court is open for prompt preventive action.*" (Italics ours.)

Again, on page 208:

"I am not prepared to say, however, that circumstances might not arise in this case, or in any other case, under the subject-matter of the act, that would justify an application to the District Court for relief."

Also, on page 208, it is said:

"I therefore think that the District Court is open at all times with jurisdiction to try a case wherein imminent, irreparable injury is properly alleged as to subject-matter and as to parties defendant."

Northrop Corp. v. Madden, et al—also

Aircraft Workers' Union v. Nylander, et al. (U. S. Dist. Ct. S. D. California), 30 Fed. Supp. 993, 995:

"The fact that plaintiffs may fear that the ultimate action of the Board may result in harm to them does not warrant action before the harm becomes real.

"It is not the province of courts of equity to use the extraordinary remedy of injunction to allay a litigant's fears. They will interfere only in proper cases to prevent threatened infraction of rights. Neither complaint discloses grounds for such interference. Hence the conclusion already announced."

VII.

A Suit Against a Subordinate Officer of the Board to Enjoin Him From Doing Acts Not Authorized by Statute Is Not in Effect a Suit Against the Board. Such Board Is Not an Indispensible Party Defendant, Because the Doctrine of Respondeat Superior Does Not Apply to Subordinate Agents of the Government.

It was suggested in the District Court that the Board is an indispensible party to the action because the acts of Spreckels, as an officer of the Board, are in fact the acts of the Board.

Where wrongful and illegal acts are in question, that is, acts outside of the jurisdiction of the Board, it is not an indispensible, or even necessary, party. No principle is better settled in public law than that the doctrine of *respondeat superior* does not apply to the acts of subordinate public officers. If a subordinate officer commits a wrongful act for which he is amenable to the court, his superior is not responsible or liable. Therefore, clearly, he should not be joined in the action.

> *Colorado v. Toll*, 268 U. S. 228 (the pertinent portion has been quoted already under Point II).

Cases which hold that a principal is not liable for acts of his deputy out of the line of his official duty or beyond the power conferred upon him by virtue of his appointment are very numerous. We cite only the following cases from this jurisdiction:

> *Fresno National Bank v. Hawkins*, 93 Cal. 551; 29 Pac. 233;
>
> *Michel v. Smith*, 188 Cal. 199; 205 Pac. 113;
>
> *Baisley v. Henry*, 55 Cal. App. 760; 204 Pac. 399;
>
> *Hilton v. Oliver*, 204 Cal. 535; 269 Pac. 425;

Noack v. Zellerbach, 11 Cal. App. (2d) 186; 53 Pac. (2d) 986.

The suit against the defendant Spreckels is therefore maintainable without joining the Board.

Conclusion.

This case presents a controversy of first impression. The action of the defendant, whether considered as purported official acts, or acts of an individual, are unauthorized under the National Labor Relations Act and void. All purported orders and utterances by the defendant are improper and void. Since they are not authorized by the National Labor Relations Act, the review provisions of the Act are not applicable. Therefore, this suit against the defendant is a suit for a wrong inflicted upon the plaintiff by the defendant in excess of his authority, and since plaintiff is without remedy under the National Labor Relations Act, its only recourse under the facts stated in the complaint is to a court of equity.

We respectfully submit that the District Court, as a court of equity, should have entertained this complaint, ascertained its merits, and entered judgment accordingly, rather than to dismiss the complaint on the erroneous assumption that it was without jurisdiction, and that the plaintiff was relegated to whatever review machinery the National Labor Relations Act provided.

Therefore, we respectfully urge that the judgment of the District Court should be reversed.

Respectfully submitted,

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JEAN WUNDERLICH,
Attorneys for Plaintiff and Appellant.

APPENDIX.

Excerpts From National Labor Relations Act. (49 Statutes 449.)

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding

under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not

less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice,

then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such tran-

script a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to facts, if supported by evidence, shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101-115).

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

No. 9681

In the United States Circuit Court of Appeals for the Ninth Circuit

AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 207, APPELLANT

v.

WALTER P. SPRECKELS, INDIVIDUALLY AND AS REGIONAL DIRECTOR, 21ST REGION, OF THE NATIONAL LABOR RELATIONS BOARD, APPELLEE

BRIEF FOR THE APPELLEE

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To be argued by:
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BRIEF FOR THE APPELLEE

JURISDICTION

This case is before the Court on an appeal from a decree of the United States District Court, Southern District of California, Central Division, dismissing the complaint in an action for an injunction.

STATEMENT OF THE CASE

Proceedings before the Board

The action arises out of a proceeding before the National Labor Relations Board, under Section 9 (c) of the National Labor Relations Act, for the investigation and certification of representatives.[1] The steps in that

[1] *Matter of Cudahy Packing Company* and *Packing House Workers Organizing Committee, C. I. O.*, Case No. R–1718, 22 N. L. R. B., No. 83; 24 N. L. R. B., No. 32.

proceeding are detailed in the Board's Direction of Election and Certification of Representatives which appear in the record (R. 29–48). Briefly summarized, they are as follows:

On October 17, 1939, Packing House Workers Organizing Committee, C. I. O., herein called P. W. O. C., filed with the Regional Director for the Twenty-first Region of the National Labor Relations Board a petition, pursuant to Section 9 (c) of the Act and Article III of the Board's Rules and Regulations, Series 2, alleging that a question of representation affecting commerce had arisen among the employees of Cudahy Packing Company at Los Angeles, and that a majority of the employees in the unit involved had designated P. W. O. C. as their collective bargaining representative, and requesting the Board to conduct an investigation and certify the representative designated by a majority of the employees in the unit in question (R. 29). On October 20, 1939, notice was given to the appellant and the Company of the filing of the petition by P. W. O. C. and of its claim to designation as collective bargaining representative by a majority of the employees in the unit (R. 36). On December 22, 1939, the Board ordered an investigation and authorized the Regional Director to conduct it and provide for appropriate hearing on due notice (R. 29). The Regional Director, appellee herein, pursuant to such order and authorization of the Board, served notices of hearing on the appellant, the employer, and P. W. O. C. (R. 29). Pursuant thereto, a hearing was held before a Trial Examiner from January 25 to February 12, 1940, in which appellant, given full opportunity to be heard, to exam-

ine and cross-examine witnesses, and to introduce evidence, appeared and was represented by counsel (R. 29–30). On March 14, 1940, pursuant to notice, oral argument was had before the Board, in which counsel for appellant participated (R. 31). On April 17, 1940, the Board issued its Decision and Direction of Election (R. 29–46), in which the Board directed the Regional Director, appellee herein, to conduct an election by secret ballot in order to ascertain the employees' choice of representative as between appellant and P. W. O. C. (R. 29–46).[2]

Pursuant to the Board's Direction of Election, appellee on May 16, 1940, conducted an election by secret ballot, and on May 17, pursuant to the Board's Rules, issued and served his Election Report on all parties (R. 47). Neither appellant nor any other party filed any objection to the conduct of the election or the Report (R. 47). The Report showing that a majority of the votes were cast in favor of P. W. O. C., the Board, on June 6, 1940, issued its formal Certification of Representatives, certifying P. W. O. C. as the collective bargaining representative of the employees in the unit in question (R. 46–48).

Proceedings before the District Court

After the conclusion of the proceeding before the Board, the appellant, on July 1, 1940, instituted an ac-

[2] In its Decision the Board held that a closed-shop contract, purported to have been entered into between appellant and the employer on November 2, 1939, after notice to them of the filing of the petition and of the claim of the petitioning union to its designation as collective bargaining representative by a majority of the employees, was not a bar to the election (R. 34–39).

tion for an injunction against the appellee and the Board in the District Court (R. 26–27).[3] On motions of the appellee and the Board, respectively, the complaint in that action was dismissed as to appellee for lack of jurisdiction of the subject matter, and the summons quashed as to the Board for lack of personal jurisdiction over it (R. 26–27).

Thereupon, on July 22, 1940, appellant instituted this present action against appellee "individually and as Regional Director, 21st Region," the complaint in which (R. 2–16) alleged that appellant was a labor organization, that in October 1938 it was chosen as collective bargaining representative by a majority of the employees in a consent election held under Board auspices, and that on November 2, 1939, it entered into a contract with the Cudahy Packing Company (R. 2–3),[4] and, in substance, that the various steps taken by appellee in the representation proceeding above described constituted an interference with its contract (R. 4–6). The relief sought by appellant is that appellee be enjoined from thus interfering with its con-

[3] *Amalgamated Meat Cutters & Butcher Workmen of N. A. Local #207* v. *National Labor Relations Board and Walter P. Spreckels, Regional Director, 21st Region* (S. D. Cal. C. D., Civil No. 1052H). But for the inclusion of the Board in that case as a party, the complaint there was identical in subject matter and relief sought to the complaint in the instant case (R. 26).

[4] The date of the entry into the contract, as appears from the record (R. 36–37), was 16 days after the filing of the petition by P. W. O. C. and 13 days after appellant and the employer were notified of the filing of the petition and the petitioning union's claim to a majority.

tract or conducting further hearings or elections in the matter (R. 7–8).

Appellee thereafter filed a motion to dismiss the complaint (R. 21–49), which was heard by the court below on July 30, 1940 (R. 49). On August 3, 1940, Honorable Leon R. Yankwich, Judge of the court below, rendered his decision (R. 56–57), and on August 13, 1940, entered his decree (R. 57–60) dismissing the complaint on the various grounds there stated. After instituting unsuccessful mandamus proceedings against Judge Yankwich,[5] appellant filed its present appeal (R. 60).

QUESTION PRESENTED

Appellant in its brief (p. 5) poses a number of questions which are in no way presented by its complaint. The basic question is whether, notwithstanding the exclusive procedure provided in the National Labor Relations Act for the matters complained of, the District Court possesses jurisdiction to enjoin an agent of the Board from the performance of his official functions. The subsidiary questions are whether the complaint alleges a cause of action entitling appellant to injunctive relief, and whether the matters sought to be enjoined are moot and whether the Board is an indispensable party to the action.

SUMMARY OF ARGUMENT

I. The United States District Court is without jurisdiction of the subject matter of the complaint.

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[5] *Amalgamated Meat Cutters* v. *Honorable Leon R. Yankwich, Judge*, C. C. A. 9, No. 9592, decision rendered October 21, 1940, denying petition for mandamus.

The matters set forth in the complaint are governed by the procedure set forth in the Act and the jurisdiction conferred upon the Board and the reviewing Circuit Courts of Appeals is exclusive.

II. The complaint fails to state a cause of action warranting injunctive relief within the jurisdiction of the District Court.

A. The complaint fails to set forth facts showing that any right of appellant is invaded by appellee or that appellant is threatened with irreparable damage cognizable in equity as a result of any matters complained of.

B. The procedure of the Act, by its terms, affords a full, adequate, and complete administrative remedy for any of the matters complained of in the complaint which appellant has failed to exhaust.

III. The matters sought to be enjoined, in addition to being moot, are those which only the Board can perform and not the appellee Spreckels as a subordinate agent. The complaint must therefore be dismissed for lack of jurisdiction over the Board, an indispensable party.

ARGUMENT

I

The United States District Court is without jurisdiction of the subject matter of the complaint

A. Under the terms and provisions of the Act, the matters set forth in the complaint are within the exclusive jurisdiction of the Board in the first instance, subject to ultimate review, as provided thereunder, by the Circuit Court of Appeals

Appellant, at this late date, raises an issue which has been conclusively determined by the highest judicial

authority. It is plain that the allegations of the complaint (R. 2–9), stripped of conclusions and factually unsupported inferences which permeate it, are based upon the routine performance by the appellee of his functions as Regional Director in a proceeding under Section 9 (c) within the exclusive jurisdiction of the Board, such as "publishing notices of hearing" and "giving notices of an election" (R. 4), and upon the performance by the Board of acts within its exclusive jurisdiction, such as conducting a hearing in Washington, and issuing the Direction of Election and Certification of Representatives in question (R. 5; 29–48).

The complaint, "so uncertain in aim and so meagre in particulars" as to "fall short of the standard of candor and precision" required of a complainant in an injunction action,[6] is not clear as to the basis for appellant's grievance, but it appears to be that the rights which it claims under the contract of November 2, 1939, are alleged to have been invaded by the representation proceeding. Plainly, the matter in question is one within the exclusive jurisdiction of the Board, for whether or not the purported contract was a bar to the proceeding of the Board and to the action taken by appellee, as agent of the Board within such proceeding, is a question which the Board is required to deal with and determine in a representation proceeding. Nothing is now more firmly established than that these matters, involving the application of the provisions of the Act in a given situation, have been vested by Con-

[6] Cf. *Hegeman Farms Co.* v. *Baldwin*, 293 U. S. 163, 170.

gress exclusively in the Board for decision,[7] and that a District Court is without jurisdiction to interfere with the Board or its agents in exercising such jurisdiction. To hold otherwise "would, . . . in effect, substitute the District Court for the Board as the tribunal to hear and determine what Congress declared the Board exclusively should hear and determine in the first instance." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 48, 50. A complaint which seeks to have the District Court pass upon matters so vested in the Board for determination presents "an insuperable objection to the maintenance of the suit in point of jurisdiction," *idem*, p. 52; *Newport News Shipbuilding Co.* v. *Schauffler*, 303 U. S. 54. This Court has held to the same effect in *Carlisle Lumber Company* v. *Hope*, 83 F. (2d) 92 (C. C. A. 9, 1936). In accord also are the various District Courts of this Circuit, in addition to the court below in the instant case, which had passed on this question. *Bethlehem Shipbuilding Corp.* v. *Nylander*, 14 F. Supp. 201 (Stephens, J.); *Aircraft Workers Union, Inc.* v. *Nylander* (S. D. Calif. Yankwich, J.), decided August 18, 1937, No. 1230–M; *Northrup Corporation* v. *Nylander* (S. D. Calif., Yankwich, J.), decided August 18, 1937, No. 1235–H; *Amalgamated Meat Cutters & Butcher Workmen of North America, Local No. 207* v. *National Labor Relations Board and Walter P. Spreckels, Regional Director, 21st Region* (S. D. Calif., Harrison, J.), decided July 12, 1940, No. 1052–H;

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[7] Subject, of course, to ultimate review by the Circuit Court of Appeals under Section 9 (d), 10 (e), and 10 (f) of the Act (see *post*, p. 15).

and this rule applies to representation proceedings under Section 9 (c) with the same force and effect as unfair labor practice proceedings under Section 10. *Heller Bros.* v. *Lind* (6 cases), 86 F. (2d) 862 (C. A. D. C.), cert. den. 300 U. S. 672; *Clark* v. *Lindemann & Hoverson Co.* (7 cases), 88 F. (2d) 59 (C. C. A. 7); *Bradley Lumber Co.* v. *Labor Board, et al.,* 84 F. (2d) 97 (C. C. A. 5), cert. den. 299 U. S. 559.

So imbedded is the doctrine of the Board's exclusive jurisdiction with respect to matters arising under the Act that the courts have refused to take jurisdiction even of suits *inter partes* which present for determination questions arising peculiarly under the Act. Thus, in *International Brotherhood of Teamsters* v. *International Union of United Brewery Workers,* 106 F. (2d) 871, 876, this Court held that an action does not lie in a federal court for a declaratory judgment determining a collective bargaining agent; since the unions "have an administrative tribunal established by Congress for the specific purpose of determining the controversy concerning the bargaining agent, the decision of that tribunal, and not the federal court, first should have been sought" (p. 876). To the same effect are *United Electrical, Radio & Machine Workers of America* v. *International Brotherhood of Electrical Workers,* 115 F. (2d) 488 (C. C. A. 2), and *Blankenship et al.* v. *Kurfman et al.,* 96 F. (2d) 450 (C. C. A. 7).

Appellant seeks to establish a basis for the District Court's jurisdiction by alleging that the acts of appellee have been performed and the proceedings of the Board had been undertaken without justification or ex-

cuse in law or in fact. This blanket assertion cannot deprive the Board of its exclusive jurisdiction and vest it in the District Court. As the Supreme Court declared in *Myers* v. *Bethlehem Shipbuilding Corp., Ltd., supra,* at pages 51–52:

> Obviously, the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage. Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact.

Plainly, the matters complained of by appellant fall within the purview of the Board's exclusive jurisdiction as vested in it by Congress, and the two District Judges below, following a long line of unbroken authority, correctly recognized that the subject matter of appellant's complaint lay beyond the jurisdiction of the District Court.

II

The complaint fails to state a cause of action warranting injunctive relief within the jurisdiction of the district court

A. The complaint fails to set forth facts showing that any right of appellant is invaded by appellee, or that it has sustained irreparable damage cognizable in equity as a result of the acts complained of

As heretofore stated, the complaint is permeated with statements of unsupported conclusions and inferences. Stripped of these matters, it is clear that

the sole basis of the complaint is the routine performance by the Board and appellee of their functions and duties under the Act. This is made plain from the nature of the only specific conduct which appellant attributes to appellee as the basis for its grievance, such as appellee's publishing notices of hearing and giving notices of an election to be held in the representation proceeding (R. 4), and "causing" the Board to hold a hearing in Washington and to issue the Direction of Election and Certification in question (R. 5).[8] That the performance of these official functions is the sole basis of the injunctive relief sought is further shown in the prayer for relief in which the only specific conduct sought to be restrained is the "holding [of] any hearing or election for the selection of collective bargaining agent, or any certification or designation of collective bargaining agent for said employees" (R. 7).

In addition to the fact that all of the acts sought to be restrained have already been performed (see *post* p. 16), the complaint is barren of a showing that any right of appellant is being invaded or that it is

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[8] Appellant includes other allegations which are plainly not allegations of fact but mere inferences and conclusions which it draws from appellee's conducting the hearing and election in question, such as "intimidation" of the employer and employees from performing the terms of the contract, "authorizing and encouraging" Harry Bridges to make assertions with reference to the validity of the contract and the future designation of a bargaining agent by the Board (R. 4) and, after the Board's certification, "advising and encouraging" the C. I. O. to negotiate a new contract with the employer (R. 5).

being threatened with irreparable damage cognizable in equity in consequence of the matters complained of. Appellant admits that "the mere existence of a contract" constitutes no "bar to election or to certification proceedings" (App. br. p. 16). The Board, faced with that question held, pursuant to its long-established policy, and with obvious correctness, that this contract, entered into after notice to the parties of filing of the petition under Section 9 (c) and of the petitioning union's claim to a majority (R. 36–37), was not a bar to the election to determine the employees' choice of representatives (see *Third Annual Report of the Board,* pp. 134–138 and cases cited).[9] Thereafter an election was held, and, on the basis of the results, which appellant has never questioned, the Board issued its Certification. Obviously, no right of appellant was or could have been invaded by the proceeding.

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[9] Appellant, in support of its assertion that the Board did not follow its established practice in the instant case, has quoted from the book "The National Labor Policy and How it Works," written by Mr. Joseph Rosenfarb, one of the attorneys on this brief. (App. Br. p. 18.) The author desires to point out that the portion quoted is inapplicable, and that the applicable portion is the paragraph on page 267 immediately preceding appellant's quotation and reading (with the footnotes omitted):

"The factor of the duration of the contract is particularly significant with reference to the time when the proceedings for investigation and certification are undertaken. *A contract is no bar to an election or certification when entered into or renewed after board proceedings for an investigation and certification have been started; when the petition has been filed or notice of claim of majority has been given to the employer before the date of the renewal of the contract or the date when notice of abrogation is to be given under the terms of the contract.*" [Italics supplied.]

The proceeding did not adjudicate the validity of the contract, but merely ascertained the employees' choice of representative. The impairment to appellant's "prestige" or the failure of the employer in view of the results of the election, thereafter to perform its purported closed-shop contract with the appellant, are not required by the certification of the Board or any action of the appellee, and, in any event, are mere incidents of carrying out the law of the land, which imposes on the Board the power and the duty, in the interest of allaying industrial strife and protecting commerce, to resolve disputes over representation by ascertaining and certifying the employees' free choice of representatives. Nor does appellant strengthen its position by urging that somewhere in its complaint may be found matter which "in substance" alleges "that the motive of the defendant in causing the machinery of the Act to be set in motion was exactly that of choking off the life of the contract" (App. br. p. 16). The answer is first that the "machinery of the Act" is under the control of the Board and not this defendant (see *post* pp. 16–19) and, secondly, equity jurisdiction cannot be predicated upon imputations of bad faith to a public official in the performance of his duties. *Continental Baking Co.* v. *Woodring,* 286 U. S. 352; *Lehman* v. *Board of Accounting,* 263 U. S. 394; *E. I. Dupont de Nemours & Co.* v. *Boland,* 85 F. (2d) 12, 14 (C. C. A. 2).

Not only is no showing made of any invasion of appellant's rights, but there is no showing of damage warranting injunctive relief. The injuries which appellant alleges, such as impairment of its "prestige" and loss of members in consequence of its being outvoted in the election, are not matters of which equity

can take cognizance without stopping the very process of Government itself. The Courts have described them as "part of the social burden of living under government," and as "not the irreparable damage as to which equity will interfere to prevent." *Heller* v. *Lind,* 86 F. (2d) 862 (App. D. C.), cert. den. 300 U. S. 672; *Myers* v. *Bethlehem Shipbuilding Corp., supra.,* at p. 53; *Newport News Shipbuilding Co.* v. *Schauffler, supra; Bradley Lumber Co.* v. *Labor Board, supra,* at p. 100.

B. The procedure of the National Labor Relations Act, by its terms, affords a full, adequate, and complete administrative remedy for any of the matters complained of in the complaint, which appellant has failed to exhaust

There being nothing alleged which requires "remedy," we need not labor the obvious point that appellant has been derelict in failing to exhaust its administrative remedies under the Act.

The proper forum for considering the appellant's objections, if any, was not the District Court but the Board itself. The Board was entitled to and had the exclusive jurisdiction, under the Act, in the first instance, to pass upon appellant's objections in connection with the general question of whether the proceeding had been conducted with due regard to the rights of the parties and in such a manner as to reflect the free choice of the employees. *Matter of Tennessee Copper Co.,* 8 N. L. R. B. 575; *Matter of Cudahy Packing Co.* (Kansas City, Kans.), 26 N. L. R. B., No. 81; *Matter of Walker Vehicle Co.,* 7 N. L. R. B. 827; *Matter of Pennsylvania Greyhound Lines,* 4 N. L. R. B 271.

The complaint is barren of any showing that the matters which it here complains of were raised before the Board.[10]

Appellant, having failed to exhaust its remedies before the Board itself, is not in a position to raise the question as to whether its remedy thereafter would have been in the District Court or in the Circuit Court of Appeals (App. Br. p. 24). We submit, however, that, assuming, contrary to the record, that appellant had raised all its objections before the Board, its remedy even thereafter would be governed exclusively by the procedure of the Act. Section 9 (d) of the Act provides that if the Board should in another proceeding, pursuant to Section 10, issue an order based, in whole or in part, on its certification, then a proceeding under Section 10 (e) or (f) to enforce or review such order brings up for review the record of the certification as well. As repeatedly stated by the Courts, and as recognized by the Court below, the remedies provided in the Act are "exclusive" and the exclusive jurisdiction conferred thereunder may not be interfered with by the District Courts. *Myers* v. *Bethlehem Shipbuilding Corp., supra; Newport News Shipbuilding Co.* v. *Schauffler, supra;* see also *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 46–47; *American Federation of Labor* v. *National Labor Relations Board,* 308 U. S. 401, 411.

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[10] On the contrary, it will be recalled that appellant, although fully participating in the Board proceeding, raised no objection to the conduct of the election or to the Election Report which appellee filed with the Board and served on all the parties (R. 47, *supra*, p. 3).

III

The matters sought to be enjoined, in addition to being moot, are those which only the Board can perform and not the appellee Spreckels as a subordinate agent. The complaint must therefore be dismissed for lack of jurisdiction over the Board, an indispensable party

The only specific conduct which appellant seeks to enjoin is the "holding of any hearing or election for the selection of collective bargaining agent, or any certification or designation as collective bargaining agent for said employees" (R. 7). The hearing and election sought to be enjoined were held and the certification issued prior to the commencement of the action (R. 29–49; *ante* pp. 2–3). The case before the Board was thus concluded and there is no showing that any further hearing, election, or certification involving the employees in question is threatened or impending. The action as to these matters is therefore moot. *Richardson* v. *McChesney,* 218 U. S. 487; *Wingert* v. *First National Bank,* 223 U. S. 670. As stated by the Supreme Court in *Newport News Co.* v. *Schauffler, supra,* p. 58:

> To the extent that relief was sought to prevent the injury resulting from a hearing, the cause appears to be moot.

The question of mootness aside, the acts sought to be enjoined are those which only the Board can perform or the appellee can undertake only at the direction of the Board. The certification of representatives can only be issued by the Board. A hearing or an election can only be supervised by the appellee, and only under the direction of the Board. Therefore, if appellant should be

granted the injunction it seeks, the real party enjoined would be the Board and not the appellee. The Board is thus an indispensable party, the absence of whom is fatal to the maintenance of the action. *Gnerich* v. *Rutter,* 265 U. S. 388, 391–392; *Webster* v. *Fall,* 266 U. S. 507, 510; *Moore* v. *Anderson,* 68 F. (2d) 191 (C. C. A. 9); *Moody* v. *Johnston,* 66 F. (2d) 999 (C. C. A. 9); *Raichle* v. *Federal Reserve Bank,* 34 F. (2d) 910, 916 (C. C. A. 2); *Alcohol Warehouse Corp.* v. *Canfield,* 11 F. (2d) 214, 215 (C. C. A. 2); *Natl. Conference on Legalizing Lotteries* v. *Goldman* and companion cases, 85 F. (2d) 66, 67, 68 (C. C. A. 2). In the *Gnerich* case, the Supreme Court dismissed a bill against a local prohibition commissioner for failure to join his superior, the Commissioner of Internal Revenue, under whose direction the acts sought to be enjoined were performed. The Court stated (p. 391):

> * * * The prohibition commissioner and the prohibition director are mere agents and subordinates of the Commissioner of Internal Revenue. They act under his direction and perform such acts only as he commits to them by the regulations. They are responsible to him and must abide by his direction. What they do is as if done by him. *He is the public's real representative in the matter, and, if the injunction were granted, his are the hands which would be tied.* All this being so, he should have been made a party defendant—the principal one—and given opportunity to defend his direction and regulations. *Litchfield* v. *Register and Re-*

> *ceiver,* 9 Wall. 575, 578; *Plested* v. *Abbey,* 228 U. S. 42, 50–51. [Italics supplied.]

The Supreme Court also cited *Warner Valley Stock Co.* v. *Smith,* 165 U. S. 28, with the following discussion of the case which is apposite here (p. 392):

> There an injunction was sought against the Secretary of the Interior and the Commissioner of the General Land Office to prevent them from giving effect to prior orders of the Secretary alleged to be outside his powers and hurtful to the plaintiff. While the suit was pending the Secretary resigned his office and there was at that time no way of bringing his successor into the suit. So, the question arose whether it could be continued against the Commissioner alone. The answer was in the negative, the Court saying, p. 34:
>
> "The purpose of the bill was to control the action of the Secretary of the Interior; the principal relief sought was against him; and the relief asked against the Commissioner of the General Land Office was only incidental, and by way of restraining him from executing the orders of his official head. To maintain such a bill against the subordinate officer alone, without joining his superior, whose acts are alleged to have been unlawful, would be contrary to settled rules of equity pleading." Calvert on Parties (2d ed.), bk. 3, c. 13.

This Court, on the authority of the cases of *Gnerich* v. *Rutter* and *Webster* v. *Fall, supra,* has held that the complaint in a suit to enjoin local federal officers from refusing to deliver a quantity of water to which

plaintiffs claimed to be entitled under a contract with the United States was defective in the absence of the Secretary of the Interior as a party. *Moore* v. *Anderson,* 68 F. (2d) 191 (C. C. A. 9). See also *Moody* v. *Johnston,* 66 F. (2d) 999 (C. C. A. 9).

The Board is a necessary party which has not and, because of the official residence of the Board and its members in the District of Columbia, cannot be brought within the jurisdiction of the court below (Judicial Code, Sec. 51, 28 U. S. C. A. § 112; *International Molders Union* v. *National Labor Relations Board,* 26 F. Supp. 423 (E. D. Pa.); *Amalgamated Meat Cutters* v. *National Labor Relations Board et al.* (S. D. Cal. C. D. No. 1052H). That alone, independently of the utter want of equity on the face of the complaint, was sufficient to require dismissal of the bill.

CONCLUSION

It is clear that the complaint is completely lacking in a showing of jurisdiction in the lower court over the subject matter; that the matter alleged is, under the Act, and, as repeatedly held by the Circuit Courts and the United States Supreme Court, within the exclusive jurisdiction of the Board; that no showing has otherwise been made warranting equity intervention; that the complaint is defective because of absence of jurisdiction over the Board, an indispensable party; and that the action, with respect to the matter sought to be enjoined, is moot.

It is respectfully submitted that the decision and decree of the court below, dismissing the complaint, were proper and should be affirmed.

Respectfully submitted.

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Appearing for Walter P. Spreckels, individually and as Regional Director, 21st Region, of the National Labor Relations Board.

FEBRUARY 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941

No. 9681.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 207,

Appellant,

vs.

WALTER P. SPRECKELS, individually, and as Regional Director, 21st Region, of the National Labor Relations Board,

Appellee.

APPELLANT'S REPLY BRIEF.

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TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

No. 9681.

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WALTER P. SPRECKELS, individually, and as Regional Director, 21st Region, of the National Labor Relations Board,

Appellee.

APPELLANT'S REPLY BRIEF.

Preliminary Statement.

Defendant's brief is an ingenious attempt to sidestep the real issues in the case. It recognizes in an oblique way that the complaint charges him with the commission of acts which are not in the remotest sense a portion of his duties as an agent of the Board. But, "stripped of these matters", we are told the complaint involves only a "routine performance by the Board and appellee of their functions and duties under the act".

The matters which are to be "stripped" off plaintiff's complaint, however, are the ones that give this controversy its particular status and color. Defendant gives no reason

why the complaint should thus be "stripped". These are precisely the matters which give rise to the important questions whether extra-legal utterances and activities under the cloak of official status can be interfered with by injunctive process, or, whether such extra-legal utterances and activities, since they cannot be properly and effectively reviewed by the review machinery of the statute, must go unremedied to the irreparable injury of the plaintiff.

The Question Involved.

The question, therefore, is not whether the District Court has jurisdiction to enjoin an agent of the Board from the performance of his official function, but the question is:

Does an agent perform an official function when he "wrongfully" intimidates and causes "said employer and numerous employees of said plant who were members, and are members, of plaintiff, and embraced within said contract, from the performance of said contract and from complying with the full obligations . . . thereof" [R. p. 4], and where he authorizes and encourages "one Harry Bridges and others who claimed to be affiliated with the labor organization known as the C.I.O., to declare and proclaim to said employees that said contract was void?" [R. p. 4].

That these charges are serious, and that they are the type of charges which the Labor Board, for its own prestige, would want to have investigated by a tribunal other than itself would seem obvious.

On the contrary, however, its agent seeks refuge behind the untenable claim of administrative immunity, by sug-

gesting that an inquiry of the nature stated in the complaint should be brought before its own trial examiners, whose findings as to the facts—if supported by evidence, no matter how conflicting—would then be binding upon the reviewing Circuit Court of Appeals.

The plain fact is that plaintiff's particular grievance touching the extra-official activities of defendant, performed under color of office, can not under any provisions of the National Labor Relations Act be brought to a hearing before that Board. Nor does defendant point out what review can be had of the activities of which he suggests the complaint should be "stripped".

Reply to Point I.

The "conclusions and factually unsupported inferences which permeate" (Appellee's Br. p. 7) the complaint, according to the Board's conception are not within the realm of "conclusions and unsupported inferences". Not by way of innuendo, nor by way of bringing before this court matters which are absent from the complaint, but solely to show that plaintiff's charges are not utterly capricious and fantastic, but comport with the findings of an inquiry of a coordinate branch of the government, we refer to the final report of the Special Committee of the House of Representatives, 76th Congress, appointed pursuant to H. Res. 258 to Investigate the National Labor Relations Board, printed in Volume 7, #18, Special Supplement of the Labor Relations Reporter issued in Washington, D. C., on December 30, 1940. In it there are discussed and documented not only extra-legal activities of various subordinates of the Board (pp. 12-22), but a fairly general bias of individual members of the Board in

favor of the C.I.O. and against the A.F. of L. is intimated (see p. 37). The conclusions of the inquiry on the basis of the evidence are stated on page 52 of this report, which we refrain from quoting only in order not to be accused of introducing extrajudicial considerations into this proceeding. The foregoing references to the Report have been made only, as already stated, for the purpose of showing that the plaintiff did not have hallucinations, or purely imaginary grievances, and that on the basis of the allegations of the complaint, there is cause for invoking the protection of equity.

The allegations in the complaint concerning defendant's extra-legal activities are not like the allegations in *Hegeman Farms Co. v. Baldwin,* 293 U. S. 163, 170. Why this particular case should be cited in this connection is difficult to see. It merely holds that a complaint for an injunction which states, in effect, that a milk rate set by a regularly appointed body is confiscatory and repugnant to the 14th Amendment of the Constitution is insufficient.

It has never occurred to this plaintiff to even suggest that the United States District Courts could interfere with a routine performance of the Board or its agents. But, on the other hand, it would not occur to the average individual that the matters heretofore quoted from the complaint such as encouraging a rival union or declaring that a contract which its official utterance assumes to be valid, is void, are "routine performances by the Board or its agents".

Defendant's cases, in so far as they hold a statutory proceeding by the Board cannot be interfered with by an injunction (Appellee's Br. pp. 8-9) do not require a reply. Manifestly, except in so far as they are the fruit of unfair

labor practices—which are, of course, not involved in this proceeding—the Board has no power to interfere directly or indirectly with existing contracts. To give the Board such a right, either by legislative action or by statutory construction, would be a violation of the 5th Amendment of the United States Constitution, and would be repugnant and contrary to our accepted concepts of due process and private rights. We are therefore not concerned with the propriety of holding an election, but we are concerned with the question whether and to what extent either by routine performances or by extra-legal activity valid and subsisting contracts can be interfered with.

Reply to Point II.

What we have just said is admitted frankly on page 13 of the Board's brief, as follows: "The proceeding did not adjudicate the validity of the contract, but merely ascertained the employee's choice of representative".

If that is the case, it is difficult to see why the defendant intimidated the employer and numerous employees in the performance of the contract, and why it suggested to Harry Bridges, and others affiliated with the C.I.O., that the contract was void, and that they should proceed on that assumption to negotiate a new and different contract between the C.I.O. and the Cudahy Packing Company, which could, of course, not be suggested in good faith, as long as the contract between the plaintiff and the Cudahy Packing Company was valid.

It is further said in this connection, that the impairment of appellant's prestige and the other losses, such as loss

of dues, and expenses which the Board chooses to overlook "are not required by the certification of the Board or any act of the appellee". If anything that the appellee did, resulted in such loss, we are assured, it was merely one of the "incidents of carrying out the law of the land, which imposes on the Board the power and the duty, in the interest of allaying industrial strikes and protecting commerce, to resolve disputes over representation".

It is obvious that what the appellee did here, leaving aside his "routine performances" could not, under any stretch of the imagination be blamed on an endeavor to carry out the law of the land. Under common notions of constitutional law and fairness in official conduct, what he did extra-legally is diametrically opposed to the law of the land.

It is further asserted that equity relief cannot be based upon imputations of bad faith to public officials in the performance of their duties. There are at least three answers to this statement:

First: The extra-legal activities of the defendant were not a part of his duties. Nothing in the National Labor Relations Act, nor about the Board's duty of "allaying industrial strife and protecting commerce, to resolve disputes over representation" could possibly require the defendant to emanate the information that plaintiff's contract is void, and that the C.I.O. should negotiate a new one, and that the old contract should no longer be performed. If anything, such conduct had exactly the opposite effect.

Second: The cases which are cited on page 13 in support of the statement that equity jurisdiction cannot be based upon imputations of bad faith to a public official do

not support that statement. The latest one of the *E. I. duPont, etc. & Co. v. Boland,* 85 Fed. (2d) 12, 14, makes the assertion (not required by the facts as reflected in the opinion) that equity jurisdiction "cannot be supported by imputing to the Board *an intention* to exercise its powers in an arbitrary or improper manner." (Emphasis ours.)

A future intention is entirely different from a course of action already embarked upon, or immediately threatened. These cases, therefore, are not in point. Quite aside from that, the complaint does not contain imputations of bad faith, but alleges specific conduct under the guise of official action which cannot, by any stretch of the imagination, be considered as such.

Third: The suggestion that courts of equity cannot remedy conduct actuated by bad faith on the part of a public official when such conduct causes loss and injury is an assertion which should find the unanimous condemnation of the judiciary determined to preserve the independence of its function, and to carry out its trust to protect the people against unwarranted encroachments upon their established rights on the part of an over-zealous administrative body.

The Board, finally, makes the suggestion that what has befallen this plaintiff is nothing but "part of the social burden of living under government". In support of that assertion we are referred to *Heller v. Lind,* 86 Fed. (2d) 862, and cognate cases (Appellee's Br. p. 14). In the case referred to the plaintiff alleges that the threatened hearings and the exercise of the "routine powers" of the Board will cause inconvenience, and will be productive of disharmony within the plaintiff's organization. It is utterly strange that officers of a free government will suggest that

irreparable loss, threatening the extinction of a lawful organization, not by reason of "routine performances" of the Board, but by reason of extra-legal activities of its subordinate is "part of the social burden of living under government."

The defendant admits in a footnote (Appellee's Br. p. 11) that other allegations besides those which he chooses to discuss are contained in the complaint, but they are disposed of by saying that they are not allegations of fact, but mere inferences and conclusions. However, the motion of the defendant to dismiss was made on the ground of lack of jurisdiction. It was not made on the ground that appellant's complaint was defective in this particular. Therefore, the point just referred to, even if the conduct of the defendant would permit of more specific allegations, is not seasonably made.

Concerning the assertion that the terms of the National Labor Relations Act afford a full and adequate administrative remedy, we will say this:

At the close of the certification proceedings, as we pointed out in the opening brief, no recourse was open to the plaintiff because the result of certification proceedings is not directly reviewable. It should not be overlooked that the real grievances of plaintiff occurred outside of and apart from those proceedings. The National Labor Relations Act has no provisions for initiating a formal complaint with the Board in Washington, by which the extra-legal conduct of its agent can be reviewed and corrected. This plaintiff has as an ultimate, and only, resort, only a court of equity. Where else, if not to a court of equity could it turn for relief from the consequences of extra-legal interference under the cloak of official action,

if not to a court of equity? Never more than now, and in this particular case, is there occasion for this Honorable Court to guard the established rights of this plaintiff, and in a wider sense to reaffirm the respective spheres of legitimate action of the three coordinate branches of the government. Now, of all times, should the courts be zealous to see that the administrative branch shall not gain the ascendancy over the other two branches to such an extent that official position may be used as a pretext and a screen to destroy rights legimately acquired and to favor one group of citizens in preference to another.

Reply to Point III.

It is not correct to state that the only specific conduct sought to be enjoined is the holding of further hearings and elections, and that since no further hearing and elections are threatened, the subject matter of the complaint has become moot.

The prayer is lengthy, and it requests, among other things, that the defendant be restrained "from issuing, authorizing or publishing any statements interfering with, or tending to interfere with" plaintiff's contract. It also requests that the defendant be enjoined from taking any other or further steps (outside of holding elections) directly or indirectly . . . tending to or having the effect of interfering with, obstructing, intimidating, coercing or influencing (the employer or the plaintiff) . . . from adhering to the terms of the valid contract". The prayer is directed, as can be readily seen, against the extra-legal activities of the defendant, as much as against the holding of any threatened further election.

Since the acts of the defendant are said in the complaint to be continuous, and that similar acts to further interfere with the contract are continuously being threatened, the question cannot be said to have become moot. It would not be moot even if the complaint were directed exclusively against the certification proceedings, because their validity would there be involved.

In Point III we are referred to the proposition that the Board in Washington is an indispensable party to this litigation. We have stated in the opening brief why this cannot be so. We now state, upon an analysis of the authorities on which defendant relies (Appellee's Br. p. 17) that those cases neither suggest nor require the conclusion that the Board is indispensable here. In each of those cases an act authorized by law or by a superior was under consideration. Extra-legal and extra-official acts, such as are being attacked here, were not being discussed. The latest of these cases, *National Conference on Legalizing Lotteries v. Goldman,* 85 Fed. (2d) 66, recognizes the lack of harmony in the cases, but attempts to reach a basis upon which it may be determined when the administrative superior must be made a party to the action, and when this procedure is not necessary.

One test suggested is that where the superior's concurrence in the acts complained of is not required, he need not be joined in the action.

We suspect that in this case the extra-legal activities of the director of the 21st Region not only do not require the concurrence of the members of the Board in Washington, but on the contrary, that they would not have found the concurrence of that body, if its advise had been asked in that respect.

Conclusion.

We respectfully urge, therefore, that this Honorable Court reverse the judgment of dismissal in this case and remand the cause to the United States District Court for the Southern District of California for further proceedings and disposition.

Respectfully submitted,

REDMOND S. BRENNAN,
W. I. GILBERT, JR.,
JEAN WUNDERLICH,
Attorneys for Appellant.

No. 9682

United States

Circuit Court of Appeals

For the Ninth Circuit.

ADOLPH B. SPRECKELS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the United States Board of Tax Appeals.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Docket No. 95639

ADOLPH B. SPRECKELS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

APPEARANCES

For Taxpayer:

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LEON de FREMERY, Esq.,
WALTER SLACK, Esq.,

For Comm'r.:

T. M. MATHER, Esq.,
E. M. WOOLF, Esq.

DOCKET ENTRIES

1938

Sep. 26—Petition received and filed. Taxpayer notified. (Fee paid)

" 26—Copy of petition served on General Counsel

Nov. 3—Answer filed by General Counsel.

" 3—Request for Circuit hearing in San Francisco filed by General Counsel.

" 9—Notice issued placing proceeding on San Francisco calendar. Copy of answer and request served.

1939

Mar. 25—Hearing set May 29, 1939 in San Francisco, California.

Jun. 8—Hearing had before Mr. Disney on merits. Submitted. Petitioner moves to amend petition—granted. Motion to consolidate with 94621 granted. Respondent allowed usual time to file amended answer. Application to file an amended petition filed and served on the parties. Briefs due 7/25/39—reply 8/15/39. Called 5/25/39.

" 15—Answer to amended petition filed by General Counsel.

" 27—Transcript of hearing of June 8, 1939 filed.

Jul. 22—Brief filed by General Counsel.

" 24—Brief filed by taxpayer. 7/24/39 copy served.

Aug. 10—Reply brief filed by General Counsel.

1939

Aug. 17—Notice to send all future notices to Walter Slack filed by Herbert W. Clark.

" 25—Motion for leave to file reply brief, reply brief lodged, filed by taxpayer. 8/28/39 granted.

" 29—Copy of motion and reply brief served on General Counsel.

1940

May 21—Findings of fact and opinion rendered, R. L. Disney, Div. 4. Decision will be entered under Rule 50.

Jun. 19—Computation of deficiency filed by General Counsel.

" 24—Hearing set July 24, 1940 on settlement.

Jul. 3—Computation of deficiency filed by taxpayer. 7/5/40 copy served.

" 24—Hearing had before Mr. Smith on settlement under Rule 50. Respondent concedes petitioner's recomputation correct. Referred to Mr. Disney for decision.

" 31—Transcript of hearing of July 24, 1940 filed.

Aug. 5—Decision entered, R. L. Disney, Div. 4.

Oct. 19—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by taxpayer.

" 25—Notice of filing petition for review (affidavit attached) filed by taxpayer. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

1940

Oct. 25—Statement of points filed by taxpayer with affidavit of service.

" 25—Designation of portions of the record filed by taxpayer. Affidavit of service attached.

[2]

United States Board of Tax Appeals
Docket No. 95639

ADOLPH B. SPRECKELS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:E:1-JHU:90D), dated July 20, 1938, and as a basis of his proceedings alleges as follows:

1. Petitioner is an individual, with his principal office at 2 Pine Street, San Francisco, California. The return for the period here involved was filed with the Collector for the First District of California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the petitioner on July 20, 1938. [3]

3. The taxes in controversy are income taxes for the calendar year 1934, and in the amount of $4,904.47.

4. The determination of tax set forth in the said notice of deficiency is based upon the following error:

(a) The Commissioner erred in increasing the petitioner's distributive share of the income received by the Trustees under the will of Adolph B. Spreckels, deceased, by the amount of $9,431.67. Said error is occasioned by erroneously adjusting the income of said Trustees by the following items:

A. The amount of $39,622.99, erroneously alleged to be taxable dividends received by said Trustees from Monarch Investment Company.

B. The amount of $16,967.02, erroneously disallowed as a deduction for interest paid by said Trustees on an income tax deficiency of the estate of Adolph B. Spreckels, deceased.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) During the year 1934 the petitioner was a beneficiary of said trust under the will of Adolph B. Spreckels, deceased.

(b) During the calendar year 1934 said Trustees received from Monarch Investment Company, a corporation, distributions in the amount of $153,000, all of which [4] distributions were made by said corporation from capital, and no part of said distributions was made by said corporation out of its earnings or profits accumulated after February

28, 1913. The Commissioner has erroneously determined that said distributions were made out of capital only to the extent of $113,377.01, and that the balance thereof, or $39,622.99, was made out of earnings accumulated after February 28, 1913.

(c) During the calendar year 1934 said Trustees paid interest in the amount of $16,967.02 on income tax deficiencies of the estate of Adolph B. Spreckels, deceased, for the years 1926 and 1931, for which said Trustees were liable as transferees of said estate. The Commissioner has erroneously disallowed the deduction of said interest on the ground that it represents an expense of said estate and not of said trust.

(d) Petitioner in making his income tax return for the calendar year 1934 showed a net income subject to Federal income tax in the sum of $121,593.86; that said amount was incorrect and excessive by reason of the failure of petitioner to take a deduction for taxes paid under the following circumstances:

During the calendar year 1934 petitioner sold stocks and bonds owned by him and as required by [5] Title VIII of the Revenue Act of 1926 as amended, and by the laws of the several states, petitioner during said calendar year paid stamp taxes on said sales amounting to $5,693.67. During said calendar year 1934 petitioner made sales of produce for future delivery, and, as required by said Title VIII of the Revenue Act of 1926 as amended, petitioner during said calendar year paid stamp taxes on said last mentioned sales amounting

to $1,525.62; that petitioner filed his income tax return for the calendar year 1934 on the 15th day of March, 1935, showing an income tax due thereon in the sum of $37,897.60. Petitioner paid the income tax shown due upon said return in installments as follows: $9,000 on March 15, 1935, $474.40 on May 18, 1935, $9,474.40 on June 12, 1935, $9,474.40 on September 11, 1935, and $9,474.40 on December 10, 1935; that thereafter and on the 23rd day of December, 1937, petitioner duly filed with the Collector of Internal Revenue at San Francisco, California, a claim for the refund of $4,087.61 income tax overpaid for the calendar year 1934 by reason of petitioner's failure to deduct the above mentioned stamp taxes in computing and paying his Federal income tax for said calendar year; that thereafter and on the 20th day of July, 1938, and in the ninety day letter hereunto attached marked Exhibit "A," the respondent conceded that [6] petitioner was entitled to the deduction of $7,219.29 for stamp taxes paid as hereinbefore stated; that by reason of petitioner's right to take an additional deduction for said sum of $7,219.29 in stamp taxes paid petitioner is entitled to a refund on account of his income tax for said year in the sum of $3,650.36.

Wherefore, petitioner prays that this Board may hear the proceeding and determine that there is no deficiency in income tax due from petitioner for the calendar year 1934, and that petitioner has overpaid his income tax for said year in the sum

of $3,650.36, and that the amount of said overpayment was paid within three years before the filing of a claim for refund of said overpayment on December 23, 1937, and within three years before the filing of this petition, and that petitioner is entitled to a refund of said sum of $3,650.36.

HERBERT W. CLARK
LEON de FREMERY
1110 Crocker Building
San Francisco, California
WALTER SLACK
1908 Russ Building
San Francisco, California
Counsel for Petitioner [7]

State of California,
County of Los Angeles—ss.

Adolph B. Spreckels, being first duly sworn, says:

That he is the Petitioner above named; that he has read the foregoing Petition and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information or belief, and that those he believes to be true.

ADOLPH B. SPRECKELS

Subscribed and sworn to before me this 21 day of September, 1938.

[Seal] CHARLES G. GOODMAN
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires April 13, 1942. [8]

EXHIBIT "A"

Treasury Department
Washington
Office of
Commissioner of Internal Revenue
Address Reply To
Commissioner of Internal Revenue
And Refer To

Jul 20 1938

Mr. Adolph B. Spreckels,
2 Pine Street,
San Francisco, California.

Sir:

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1934 discloses a deficiency of $1,254.11 as shown in the statement attached.

In accordance with section 272(a) of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C1:P-7. The signing and filing of this form will expedite the

closing of your return(s) by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,
GUY T. HELVERING,
Commissioner.
By JOHN R. KIRK
Deputy Commissioner.

Enclosures:
Statement
Form 870 [9]

STATEMENT

IT:E:1
JHU:90D

Mr. Adolph B. Spreckels,
2 Pine Street,
San Francisco, California.
Tax Liability for Taxable Year Ended
December 31, 1934

Income tax
Liability—$39,151.71
Assessed—$37,897.60
Deficiency—$1,254.11

In making this determination of your income tax liability, careful consideration has been given to the internal revenue agent's report dated March 4, 1936; to your protest dated June 4, 1936; to the

statements made at the conference held July 15, 1936; and to your claim for refund of individual income tax in the amount of $4,087.61.

If a petition to the United States Board of Tax Appeals is filed against the deficiency proposed herein, the issue set forth in your claim for refund should be made a part of the petition to be considered by the Board in any redetermination of your tax liability. If a petition is not filed, the claim for refund will be disallowed and official notice will be issued by registered mail in accordance with section 1103(a) of the Revenue Act of 1932.

Adjustments to Net Income

Net income as disclosed by return	$121,593.86
Unallowable deductions and additional income:	
(a) Dividends	9,431.67
Total	$131,025.53
Nontaxable income and additional deductions:	
(b) Taxes paid	6,518.49
Net income adjusted	$124,507.04

[10]

Explanation of Adjustments

(a) Your share of adjusted income from Walter D. K. Gibson, et al, Trustees under will, Estate of Adolph B. Spreckels, deceased (Trust), has been determined to be $37,664.21, taxable as dividends. As you included $28,232.54 as dividends from the trust in your return, the amount reported has been increased by $9,431.67.

In determining the correct net income of the trust the amount reported on the fiduciary return was adjusted as follows:

Net income reported on fiduciary return, form 1041	$194,626.17
Add:	
1. Dividends	39,622.99
2. Interest deduction disallowed	16,967.02
Net income adjusted	$251,216.18
Distribution of income:	
Mrs. Alma Spreckels	$134,454.88
Adolph B. Spreckels	37,664.21
Mrs. Alma Spreckels Rosekrans	37,664.21
Mrs. Dorothy S. Dupuy	38,432.88
Estate of Adolph B. Spreckels, Deceased (Trust)	3,000.00
Total	$251,216.18

1. Dividends from the Monarch Investment Company have been allocated as shown below:

Date Paid	Amount Paid	Taxable (From Corporate Earnings Since February 28, 1913)	From Capital	Percent Taxable
March 3, 1934	$130,000.00	$16,622.99	$113,377.01	
November 13, 1934	23,000.00	23,000.00	—	
	$153,000.00	$39,622.99	$113,377.01	25.8974

As no dividends from the Monarch Investment Company were reported in the fiduciary return as income, the adjustment of this item increases dividends by $39,622.99.

2. The deduction of $16,967.02 for interest paid by the trustees of the trust on income tax deficiencies of the Estate of Adolph B. Spreckels, deceased, has been disallowed, for the reason that the amount represents expense of the estate and not of the trust. See the decision of the United States Board of Tax Appeals in Helen B. Sulzberger et al, 33 B. T. A. 1093.

In determining the fiduciary income taxable to the beneficiaries the examining officer included in distributable income $3,000.00, representing an annuity payment to Anna De Bretteville. As this amount is held to be taxable to the trust, your distributive fiduciary income as adjusted by the report has been reduced by one sixth of $3,000.00 or $500.00.

(b) The deduction of $700.80 for taxes paid on whiskey withdrawn from bonded warehouses has been disallowed in accordance with Income Tax Ruling 2768, Cumulative Bulletin XIII-1, 54 (1934).

An additional deduction of $7,219.29 for taxes paid on the sales of securities and commodities has been allowed in connection with your claim.

You contended that total stamp taxes paid amounted to $7,299.29. The information submitted by the examining officer indicates that the above-stated amount includes securities exchange regis-

tration fee, not in excess of $80.00. This is not deductible as a tax. See Income Tax Ruling 3161, Internal Revenue Bulletin, February 14, 1938, No. 7. The remainder of the taxes claimed, $7,219.29, is held to be deductible in accordance with section 23(c)2 of the Revenue Act of 1934 and General Counsel's Memorandum 18245, Cumulative Bulletin, 1937-1, 70.

Computation of Tax

Net income adjusted		$124,507.04
Less:		
Personal exemption	$ 2,500.00	
Credit for dependents	933.33	3,433.33
Balance (surtax net income)		$121,073.71

[12]

Brought forward		$121,073.71
Less:		
Interest on Liberty Bonds	$ 13,554.94	
Dividends	101,786.71	
Earned income credit	300.00	115,641.65
Net income subject to normal tax		$ 5,432.06
Normal tax at 4% on $5,432.06		217.28
Surtax on $121,073.71		38,958.33
Total tax		$ 39,175.61
Less:		
Income tax paid at source		23.90
Correct income tax liability		$ 39,151.71
Income tax assessed:		
Original, account #201806, May 1935		37,897.60
Deficiency of income tax		$ 1,254.11

[Endorsed]: U. S. B. T. A. Filed Sept. 26, 1938.

[13]

[Title of Board and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above-named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits that the taxes in controversy are income taxes for the calendar year 1934, as alleged in paragraph 3 of the petition. For lack of information denies that the amount of tax in controversy is $4,904.47, as alleged in paragraph 3 of the petition.

4, (a), A and B. Denies that the Commissioner erred in the determination of tax, set forth *the* the said notice of deficiency, as alleged in subparagraph (a) of paragraph 4 of the petition, and [14] in subparagraphs A and B of subparagraph (a) of paragraph 4 of the petition.

5. (a) Admits the allegations contained in subparagraph (a) of paragraph 5 of the petition.

(b) Admits that during the calendar year 1934, the trustees of the trust under the will of Adolph B. Spreckels, deceased, received from Monarch Investment Company, a corporation, distributions in

the amount of $153,000.00, and that the Commissioner has determined that of said distributions the amount of $39,622.99 was made out of earnings accumulated after February 28, 1913, as alleged in subparagraph (b) of paragraph 5 of the petition. Denies that said determination by the Commissioner was in error and denies all other allegations contained in subparagraph (b) of paragraph 5 of the petition.

(c) Admits that the Commissioner has disallowed as a 1934 deduction, claimed by the trustees of the trust under the will of Adolph B. Spreckels, deceased, the amount of $16,967.02, for interest on income tax deficiencies of the estate of Adolph B. Spreckels, deceased, on the ground that such a payment represented an expense of the estate and not of the trust, as alleged in subparagraph (c) of paragraph 5 of the petition. Denies that the Commissioner erred in disallowing said deduction and, for lack of information, denies all other allegations contained in subparagraph (c) of paragraph 5 of the petition. [15]

(d) Admits that the petitioner, in making his completed income tax return for the calendar year 1934, showed a net income subject to Federal income tax in the sum of $121,593.86, and showed an income tax due thereon in the amount of $37,897.60, as alleged in subparagraph (d) of paragraph 5 of the petition. Admits that the Commissioner, in his ninety-day letter, conceded that the petitioner was entitled to a 1934 deduction of $7,219.29 for stamp taxes paid, as alleged in subparagraph (d) of para-

graph 5 of the petition. For lack of information, and for other reasons, denies all other allegations contained in subparagraph (d) of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation in the petition not heretofore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal be denied.

Signed J. P. WENCHEL,
TMM
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
ALVA C. BAIRD,
ARTHUR L. MURRAY,
Special Attorneys,
Bureau of Internal Revenue.

ALM/F 10-28-38

[Endorsed]: U. S. B. T. A. Filed Nov. 3, 1938.

[16]

[Title of Board and Cause.]

APPLICATION FOR LEAVE TO FILE AMENDMENT TO PETITION

To the United States Board of Tax Appeals:

Now comes the petitioner above named and asks leave to file an amendment to his petition in the above entitled proceeding on the ground that the

same is necessary for a proper presentation of petitioner's appeal.

Dated: San Francisco, June 7th, 1939.

HERBERT W. CLARK
WS
LEON de FREMERY
WS
1110 Crocker Building
San Francisco, California
WALTER SLACK
1908 Russ Building
San Francisco, California
Counsel for Petitioner

Granted June 8, 1939.

(Signed) R. L. DISNEY
Member U. S. Board of Tax Appeals.

[Endorsed]: U. S. B. T. A. Filed at hearing June 8, 1939. [17]

[Title of Board and Cause.]

AMENDMENT TO PETITION

Now comes the petitioner above named and leave having first been obtained, files this amendment to his petition in the above-entitled proceeding and alleges as follows:

I

That the determination of tax set forth in the notice of deficiency, a copy of which is attached to the original petition, is erroneous in the following

particular in addition to the errors specified in the original petition, viz:

(b) That the Commissioner erred in not allowing as a deduction in determining petitioner's income subject to income tax for the calendar year 1934 the sum of $23,909.29 representing selling commissions paid in connection with the sales of stocks, bonds and commodities. [18]

II

The facts upon which petitioner relies in support of this amendment to his petition and the supplemental assignment of error hereinabove set forth are as follows:

(e) Petitioner in making his income tax return for the calendar year 1934 showed a net income subject to Federal income tax in the sum of $121,593.86; that said amount was incorrect and excessive by reason of the failure of petitioner to take a deduction for selling commissions paid in connection with the sales of stocks, bonds and commodities under the following circumstances: during the calendar year 1934 petitioner was engaged in the business of purchasing and selling stocks, bonds and commodities for profit and during said calendar year paid selling commissions in connection with such sales amounting to $23,909.29; that said selling commissions so paid as aforesaid were not taken as a deduction in computing petitioner's income tax for said year. Under Section 23(a) of the Revenue Act of 1934 and Articles 23(a)-1 and 24-2 of Regulations 86, said commissions are deductible in com-

puting petitioner's net income and petitioner claims the right to deduct the same.

Wherefore, petitioner prays that this Board may hear the proceeding and determine that there is no deficiency in income tax due from petitioner for the calendar year 1934, [19] and that petitioner has overpaid his income tax for said year in the sum of $4,087.61, and that the amount of said overpayment was paid within three years before the filing of a claim for refund of said overpayment on December 23, 1937, and within three years before the filing of the original petition herein and that this petitioner is entitled to a refund of $4,087.61.

HERBERT W. CLARK
LEON de FREMERY
1110 Crocker Building
San Francisco, California
WALTER SLACK
1908 Russ Building
San Francisco, California
Counsel for Petitioner [20]

State of California,
City and County of San Francisco—ss.

Adolph B. Spreckels, being duly sworn, says:

That he is the petitioner above named; that he has read the foregoing Amendment to Petition and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those he believes to be true.

ADOLPH B. SPRECKELS

Subscribed and sworn to before me this 23rd day of May, 1939.

[Seal] LOUIS WIENER

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires: July 30, 1939.

Granted June 8, 1939.

(Signed) R. L. DISNEY

Member U. S. Board of Tax Appeals

[Endorsed]: U. S. B. T. A. Filed at hearing June 8, 1939. [21]

[Title of Board and Cause.]

ANSWER TO AMENDMENT TO PETITION

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the amendment to petition filed by the above-named petitioner, admits and denies as follows:

I. (b) Denies the allegations contained in subparagraph (b) of paragraph I of the amendment to petition.

II. (e) Admits that petitioner in making his income tax return for the calendar year 1934 showed a net income subject to Federal income tax in the sum of $121,593.86, but denies the remaining allegations contained in subparagraph (e) of paragraph II of the amendment to petition.

III. Denies generally and specifically each and every allegation in the amendment to petition not hereinbefore admitted, qualified, or denied. [22]

Wherefore, it is prayed that the Commissioner's determination be approved and that the petitioner's appeal be denied.

Signed J. P. WENCHEL
T M M
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
ALVA C. BAIRD,
T. M. MATHER,
Special Attorneys,
Bureau of Internal Revenue.

TMM:emb 6-9-39

[Endorsed]: U. S. B. T. A. Filed June 15, 1939. [23]

[Title of Board and Cause.]

Docket Nos. 94621, 95639.

Promulgated May 21, 1940.

FINDINGS OF FACT AND OPINION

1. Petitioner was engaged in the business of purchasing and selling stocks, bonds, and commodities for profit. Held, selling commissions paid to brokers were properly deducted as business expense. Neuberger v. Commissioner, 104 Fed. (2d) 649.

2. Prior to determination of deficiency, petitioner filed a claim for refund of taxes paid, on the

ground that he had not taken deduction for stamp taxes paid. In determining the deficiency, the stamp taxes were allowed as deductions, but other items resulted in determination of a deficiency. Stipulations show an overpayment of tax. At the hearing, more than three years after the last payment of tax, an amendment was filed, the effect of which was to claim, on new grounds, refund of overpayment. Held, the claim of overpayment is barred by limitations. Sec. 322(d), Revenue Act of 1934; Commissioner v. Rieck, 104 Fed. (2d) 294, and Commissioner v. Estate of George M. Dallas, — Fed. (2d) — (Mar. 25, 1940), followed.

Walter Slack, Esq., for the petitioner.

T. M. Mather, Esq., for the respondent.

These proceedings, consolidated for hearing, involved originally deficiencies in income tax in the amount of $1,254.11 for the year 1934 and in the amount of $4,675.17 for the year 1935.

All of the errors raised in the original petition were disposed of by stipulation at the trial, will be reflected in computation under Rule 50, and need not further be considered herein. The issues to be examined were raised by amended petition filed in each proceeding at the hearing on June 8, 1939. Two questions are presented—first, whether a trader in securities may deduct as ordinary and necessary expense of business selling commissions paid by him, and, second, whether claim for overpayment set forth in an amended petition filed more than three years after payment of the last installment of tax is timely. The first proposition involves both

taxable years; the second only 1934, in proceeding No. 95639, in which the amended petition asks for refund of overpayment of $4,087.61. [24] In proceeding No. 94621, for 1935, the amended petition asks for refund of overpayment of $1,323.70.

A part of the facts were stipulated at trial, but since the stipulation is brief it will be incorporated in the findings of fact, which we make as follows:

FINDINGS OF FACT.

The petitioner, an individual who resides in San Francisco, California, filed his income tax returns for the years in question with the collector for the first district of California. During the taxable years he maintained an office, with employees keeping a complete set of books, which were kept and the income tax returns were made upon the basis of cash receipts and disbursements. Petitioner was engaged in the business of purchasing and selling stocks, bonds, and commodities for profit. He paid to brokers selling commissions in connection with such sales as follows: In 1934, $23,692; in 1935, $2,246.25. Petitioner did not deduct the selling commissions in computing income in making his income tax returns for the taxable years. Upon petitioner's books the selling commissions were deducted from the selling price, before net profit or loss was determined.

Petitioner's income tax return for 1934, filed on May 9, 1935, showed a net taxable income of $121,593.86 and a tax of $37,897.60, which was paid in installments, the last payment being made Decem-

ber 16, 1935 in the amount of $9,474.40. On December 23, 1937, petitioner filed a claim for refund of income tax in the amount of $4,087.61, on the ground that certain stamp taxes were paid that had not been claimed as deductions in the return. With the exception of $80, this claim was allowed in the determination of the Commissioner in the deficiency letter, which was dated July 20, 1938. Petition to the Board was filed September 26, 1938, in proceeding No. 95639. It was stipulated that $7,828.51 may be excluded from income for 1934 as determined by the Commissioner, and that the amount of dividend credit should be reduced by $7,828.51.

Petitioner's income tax return for 1935, filed April 15, 1936, showed a net taxable income of $141,146.57 and a tax of $48,554.03, which was paid, the last installment, $12,138.50, being made December 11, 1936. Deficiency letter was dated April 7, 1938. After the filing of the petition for 1935 in proceeding No. 94621 on July 6, 1938, petitioner on March 9, 1939, filed with the collector of internal revenue at San Francisco, California, a claim for refund of income tax of $1,323.70 by reason of petitioner's failure to deduct commissions on sales of bonds, commodities, and stocks. [25]

It was stipulated that income as determined by the Commissioner for 1935 may be reduced by $9,-437.24, with a reduction in the same amount in dividend credit.

Petitioner reported on his income tax return for 1934 losses of $114,249.38 from sale of stocks and

commodities, and took as a deduction $2,000; also, for 1935 the losses on commodity and stock transactions were reported as $8,009.69, and loss deducted was $2,000.

OPINION.

Disney: 1. Are selling commissions paid by a trader in securities deductible as business expense?

After the decision of the Circuit Court in Winmill v. Commissioner, 93 Fed. (2d) 494, we allowed selling commissions as well as purchasing commissions, in Harry H. Neuberger, 37 B. T. A. 223. On appeal to the Circuit Court our decision as to selling commissions was affirmed. Neuberger v. Commissioner, 104 Fed. (2d) 649. Certiorari was not applied for by the Commissioner. We think the dicta in Helvering v. Winmill, 305 U. S. 79, and in Helvering v. Union Pacific R. R. Co., 293 U. S. 282, referred to by respondent, are not decisive of the point here presented. We hold therefore that the respondent upon the point is in error, and that the selling commissions are allowable deductions.

The result, as to the year 1935 and in proceeding No. 94621, is that we find there is no deficiency and that there is an overpayment of tax by the petitioner in the amount of $1,323.70 paid on December 11, 1936, both within three years before the filing of claim therefor by amendment to the petition filed on June 8, 1939, and within three years before the filing of the claim for refund on March 9, 1939.

As to the year 1934, in proceeding No. 95639, a different situation is presented. The result of a

stipulation entered into at the hearing is that there was an overpayment for the year 1934, but the respondent objected to the filing of the amendment to the petition, on the ground that the claim of overpayment thereby advanced was not timely, being presented for the first time on June 8, 1939, more than three years after the payment of the last installment of tax. Respondent relies on Commissioner v. Rieck, 104 Fed. (2d) 294; certiorari denied, 308 U. S. 602, and the cases therein cited, and says that case bars consideration of the selling commissions as new grounds for claim of overpayment, because set up by amendment after the statute had run. Petitioner refers us to Georgie W. Rathborne, 39 B. T. A. 56. In the latter we followed our decision in Edward E. Rieck, 35 B. T. A. 1178, which was reversed by Commissioner v. Rieck, supra. In both cases we had entertained and allowed [26] claims for overpayment on new grounds set up in amended petitions, on the theory that such amendments related back to the filing of the original petition, and were therefore not within the bar of the statute. This theory is untenable since the decision of the Circuit Court in the Rieck case. Petitioner, however, seeks to avoid the effect of that decision by a contention that "The new error assigned in the amended petition does not give rise to this overpayment, but serves to prevent its reduction on account of other adjustments." He also argues:

> * * * petitioner is not asking for a refund of any taxes paid by reason of his failure to

> deduct selling commissions in preparing his 1934 income tax return, but is asking for the full allowance of a timely refund claim resulting from a failure to claim a deduction for stamp taxes paid during that year, the amount of which the respondent seeks to reduce by asserting other errors in the return. Petitioner claims the right to offset these other errors by the amount of selling commissions paid and thereby secure the full amount of his timely refund for the stamp taxes.

In other words, petitioner in effect contends that he is utilizing the claim as to deductible selling commissions, not as new ground for claim of overpayment, but merely to offset the offset which the Commissioner, by other items, set up against the original claim of overpayment on grounds of stamp taxes paid but not deducted. Thus, petitioner seems to argue, the original claim for refund, timely filed, is left alive and undiminished, and he now claims thereunder. Thus petitioner seeks by indirection to accomplish what can not be done directly. We think there is no essential difference between the situation here and in the Rieck case, for we think that petitioner is in fact relying upon new grounds for the overpayment. The amended petition, after reciting the facts as to payment of selling commissions of $23,909.29 and alleging thus deductibility concludes:

> Wherefore, petitioner prays that this Board may hear the proceeding and determine that

there is no deficiency in income tax due from petitioner for the calendar year 1934, and that petitioner has overpaid his income tax for said year in the sum of $4,087.61, and that the amount of said overpayment was paid within three years before the filing of a claim for refund of said overpayment on December 23, 1937, and within three years before the filing of the original petition herein and that this petitioner is entitled to a refund of $4,087.61.

It thus appears that claim of overpayment is in fact set up anew in the amended petition, and that the only reason therefor lies in the new facts recited—the selling commissions. We think it apparent that the selling commissions are the ground of claim of overpayment. That there is new claim of overpayment is demonstrated by the fact that the claim is for $4,087.61 instead of $3,650.36, the [27] amount of overpayment claimed in the original petition. Also, it is noteworthy that the $4,087.61 overpayment claimed in the amendment is the amount of the original refund claim, filed with the Commissioner prior to determination of deficiency. Thus it appears that petitioner is now relying, not upon his original claim of overpayment of $3,650.36, but instead upon the refund claim. But that refund claim was in effect allowed by the Commissioner, for in determining the deficiency he agreed (except as to $80) that the payment of stamp taxes, pressed as ground of the refund claim, was a deductible item, and therefore gave credit,

in effect, against the deficiency otherwise appearing, of the amount of the refund claim, with the small exception of $80. In Suhr v. United States, 18 Fed. (2d) 81, a very similar situation appears. There a claim for refund was, as here, filed prior to determination of deficiency because of claim that nontaxable stock dividends had been reported as income. After examination of the taxpayer's books the Commissioner gave the taxpayer credit for the dividends, but found a deficiency because of other matters. The taxpayer appealed to the Board, alleging that there was no deficiency, but an overpayment. He also filed an action in the Federal Court. The question was as to jurisdiction of the court. On appeal the Circuit Court said, as to the overpayment: "He was simply entitled to have the overpayment credited against his other tax liability." This seems exactly what the Commissioner did herein. We think it disposed of the original refund claim, that the petitioner here should not now be heard to rely upon that claim, and that he is in fact relying upon the new grounds as to selling commissions, barred by the statute. We find no material distinction between the situation here and that in Commissioner v. Rieck, supra. Moreover, that case has lately been approved and followed in Commissioner v. Estate of George M. Dallas, —— Fed. (2d) —— (C. C. A., 2d Cir., Mar. 25, 1940), wherein the facts were similar to those in the Rieck case. The court held that a refund of the overpayment was barred, under section

322(d) of the Revenue Act of 1932, by the lapse of more than two years before the filing of the amended petition which first set up the grounds of overpayment.

On April 30, 1940 (41 B. T. A. ——), we reconsidered the decision entered in Denholm & McKay Co., 39 B. T. A. 767, and, following Commissioner v. Rieck, supra, and Commissioner v. Estate of George M. Dallas, supra, held that an amended petition filed more than three years after payment of tax does not relate back to the time of filing of original petition so as to authorize the crediting or refunding of an overpayment in tax attributable to a new issue raised in the [28] amended petition, under section 322 (d) of the Revenue Act of 1934, as amended.

It appearing, from evidence adduced since the filing of the amendment to the petition, that the last payment of tax had been made more than three years before the amendment, we conclude and hold that the petitioner's claim for refund of overpayment is barred by the statute of limitations. Sec. 322 (d), Revenue Act of 1934.

Decision will be entered under Rule 50. [29]

[Title of Board and Cause.]

PETITIONER'S COMPUTATION FOR ENTRY OF DECISION

The attached computation is submitted on behalf of petition to the United States Board of Tax Ap-

peals in compliance with its opinion determining the issues in this proceeding. This computation is submitted without prejudice to the petitioner's right to contest the correctness of the decision entered herein by the Board pursuant to the statutes in such cases made and provided.

WALTER SLACK,
825 Balfour Building, San Francisco, California,
Counsel for Petitioner.

[30]

ADOLPH B. SPRECKELS

Docket No. 95639
Income tax Liability for Year ended December 31, 1934

RE-COMPUTATION OF TAX LIABILITY PREPARED IN ACCORDANCE WITH THE OPINION OF THE UNITED STATES BOARD OF TAX APPEALS, PROMULGATED MAY 21, 1940, 41 B. T. A. No. 160

Income per 90 day letter			$124,507.04
Less exclusion as stipulated			7,828.51
Net income adjusted			$116,678.53
Less: Personal exemption		$ 2,500.00	
Credit for dependents		933.33	3,433.33
Surtax net income			$113,245.20
Less: Interest on Liberty Bonds		$13,554.94	
Dividends:			
90 day letter	$101,786.71		
Reduction as stipulated	7,828.51	93,958.20	
Earned income credit		300.00	$107,813.14
Normal tax income			5,432.06

[31]

Normal tax	$ 217.28
Surtax	34,887.50
Total tax	35,104.78
Less: income tax paid at source	23.90
Correct tax liability	$35,080.88
Income assessed on original return	37,897.60
Overpayment	2,816.72

Petitioner requests that the Board determine as a part of its decision that said overpayment was paid within three years before the filing of a claim for refund, viz., that petitioner paid $9,474.40 on account of his income tax liability for 1934 on December 16, 1935, and filed a claim for refund of $4,087.61 of said taxes on December 23, 1937.

Petitioner has not in the foregoing computation given effect to a deduction for selling commissions amounting to $23,692.00 paid brokers on sales of stocks, bonds and commodities for profit during the year 1934, as the Board in its opinion held any claim for refund of the overpayment of income taxes resulting from the failure to claim such deduction is barred by Section 322 (d) Revenue Act of 1934. Petitioner reserves the right to claim by and in proceedings for review of the Board's decision that such overpayment is refundable to the extent of $1,190.89, the difference between the amount of the timely refund claimed on December 23, 1937, and the amount of the overpayment above shown.

[Endorsed]: U. S. B. T. A. Filed July 3, 1940.

[32]

United States Board of Tax Appeals
Washington

Docket No. 95639.

ADOLPH B. SPRECKELS,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION.

Pursuant to hearing on July 24, 1940, on alternative computations submitted by the parties under Rule 50, at which time the respondent conceded that the recomputation filed by the petitioner is correct, it is

Ordered and decided: That there is an overpayment in income tax for the year 1934 in the amount of $2,816.72, which amount was paid within three years before the filing of a claim for refund. (Section 809 (a), Revenue Act of 1938.)

Enter:

Entered Aug. 5, 1940.

[Seal] (Signed) R. L. DISNEY,
Member [33]

[Title of Board and Cause.]

PETITION FOR REVIEW OF DECISION BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Adolph B. Spreckels, the petitioner above named, by Walter Slack, his attorney of record, hereby files this his petition for a review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the United States Board of Tax Appeals rendered in the above entitled appeal on August 5, 1940 in so far as said decision failed to find that petitioner had overpaid his income tax for the year 1934 in the sum of $4,087.61 (rather than in the sum of $2,816.72, as decided by the Board), within three years before the filing of a claim for refund, and respectfully shows:

I. Venue

The petitioner, Adolph B. Spreckels, is an individual who resides in San Francisco, California. Petitioner filed [34] his federal income tax return for the calendar year 1934 with the collector for the first district of California, whose office is within the jurisdiction of said United States Circuit Court of Appeals for the Ninth Circuit, which is the court within which this review is sought.

II. Nature of the Controversy

The nature of the controversy is as follows:

Petitioner filed his federal income tax return for 1934 on May 9, 1935, showing a net taxable income

of $121,593.86 and a tax liability of $37,897.60, which was paid in installments, the last payment being made on December 16, 1935, in the amount of $9,474.40. On December 23, 1937, petitioner filed a timely claim for refund of income tax in the amount of $4,087.61 on the ground that certain stamp taxes had been paid that had not been claimed as deductions in the return. Respondent in a deficiency letter dated July 20, 1938 conceded this claim with respect to the stamp taxes, with the exception of $80, but, by reason of other adjustments, asserted a deficiency of $1,254.11 for the year. A petition for redetermination was filed with the Board on September 26, 1938 wherein error was assigned as to the other adjustments made by the respondent, and petitioner asserted that he had overpaid his income tax for the year by reason of his failure to claim a [35] deduction for the stamp taxes referred to in the refund claim of December 23, 1937.

At the hearing before the Board on June 8, 1939, petitioner was granted leave to file an amendment to his petition setting forth an additional error on the part of the respondent in failing to allow petitioner a deduction for selling commissions paid in connection with sales of stocks, bonds and commodities in the sum of $23,909.29. The amendment closed with a prayer for the refund of the $4,087.61 claimed in the refund claim filed on December 23, 1937.

The Board held that the selling commissions were legally deductible in determining petitioner's income tax liability, with the result that petitioner had in fact overpaid his income tax by more than $15,000, an amount in excess of the refund claimed on December 23, 1937. However, on the ground that the amendment assigning error in respect to the deduction for selling commissions had not been filed within three years after the payment of the last installment of tax, the Board ruled that the omitted deduction could not be given effect in determining petitioner's income tax liability for the year in question, and limited the refund on account of stamp taxes to $2,816.72, the amount of overpayment resulting from a partial disallowance of respondent's other adjustments. [36]

Petitioner asserted before the Board, and will urge on this petition for review, that the Board has jurisdiction to allow amendments at any time before trial to bring in additional specifications of error in the determination of tax liability, without regard to the elapse of the period for filing claims for refund, and that if the Board's redetermination shows an overpayment, the taxpayer is entitled to a refund of so much of the overpayment as is included in a timely and valid claim therefor.

Wherefore, petitioner prays that the United States Circuit Court of Appeals for the Ninth Circuit review the decision of the United States Board of Tax Appeals entered in the above entitled appeal on August 5, 1940, and determine that petitioner is

entitled to a refund of $4,087.61, the full amount claimed in his refund claim filed on December 23, 1937.

WALTER SLACK,
825 Balfour Building, San Francisco, California, Attorney for Petitioner.

[Endorsed]: U. S. B. T. A. Filed Oct. 19, 1940.
[37]

[Title of Board and Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To: J. P. Wenchel, Esq.
Chief Counsel Bureau of Internal Revenue
Washington, D. C.

Please take notice that on October 19, 1940, the above named petitioner filed with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the Board heretofore rendered in the above entitled appeal and entered on August 5, 1940 in so far as said decision failed to find that petitioner had overpaid his income tax for the year 1934 in the sum of $4,087.61 (rather than in the sum of $2,816.72, as decided by the Board) within three years before the filing of a

claim for refund. A copy of the petition for review [38] as filed is served on you herewith.

Dated: October 21, 1940.

WALTER SLACK,
825 Balfour Building, San Francisco, California, Attorney for Petitioner.

[39]

[Title of Board and Cause.]

AFFIDAVIT OF SERVICE OF NOTICE OF FILING OF PETITION FOR REVIEW AND COPY OF PETITION FOR REVIEW

State of California
City and County of San Francisco—ss.

J. A. Poma, being first duly sworn, deposes and says:

That she is, and was at the time of the service hereinafter referred to, a resident of the City and County of San Francisco, State of California, and a citizen of the United States, over the age of twenty-one years, and not a party to nor interested in the above mentioned appeal; that the address of affiant is 2265 Larkin Street, San Francisco, California.

That on the 21st day of October, 1940, affiant deposited in the registered mail at the United States post office at [40] San Francisco, California, a duplicate original of the attached Notice of Filing Petition for Review and a copy of the Petition for Review therein referred to in a sealed en-

velope addressed to J. P. Wenchel, Esq., Chief Counsel, Bureau of Internal Revenue, Internal Revenue Building, Washington, D. C.; that at the time of such deposit affiant fully prepaid the first class postage thereon and the registry fee therefor; that at the time of such deposit there was regular communication by mail between the said City and County of San Francisco and the city of Washington, D. C.

J. A. POMA

Subscribed and sworn to before me this 21st day of October, 1940.

[Seal] CATHERINE E. KEITH

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires Oct. 20, 1942.

[Endorsed]: U. S. B. T. A. Filed Oct. 25, 1940.

[41]

[Title of Board and Cause]

STATEMENT OF POINTS TO BE RELIED UPON BY PETITIONER ON REVIEW BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT OF THE DECISION OF THE UNITED STATES BOARD OF TAX APPEALS ENTERED ON AUGUST 5, 1940

Now comes Adolph B. Spreckels, the petitioner in the above entitled appeal, by his attorney, Walter Slack, and states the points upon which he in-

tends to rely on his petition for a review of the above decision, viz:

1. The Board of Tax Appeals having determined that selling commissions in the amount of $23,692.00, paid by petitioner on sales of stocks, bonds and commodities, were allowable deductions in determining petitioner's liability for federal income tax for the year 1934, with the result that petitioner had overpaid his federal income tax for that [42] year in an amount in excess of $15,000.00, and it appearing that petitioner had filed a timely claim for a refund of income tax for that year in the amount of $4,087.61, grounded upon an omitted deduction which entered into the determination of petitioner's taxable income, the Board erred in not allowing the full amount claimed.

2. The Board erred in holding, in effect, that it could not consider, in redetermining petitioner's income tax liability for the year 1934, error in that determination first asserted in an amended petition filed more than three years after the last payment of tax had been made.

3. The Board erred in deciding that the amount of the overpayment of petitioner's income tax for the year 1934 did not exceed the sum of $2,816.72.

4. The Board erred in failing to decide that petitioner had overpaid his income tax for the year 1934 in an amount not less than $4,087.61.

5. The Board erred in failing to decide that petitioner had overpaid his income tax for the year 1934 in an amount not less than $4,087.61 within

three years before the filing of a valid claim for refund.

6. The Board erred in failing to decide that petitioner had overpaid his income tax for the year 1934, in an amount not less than $4,087.61, within three years before the filing [43] of the petition for redetermination.

WALTER SLACK,
825 Balfour Building, San Francisco, California, Attorney for Petitioner.

[Endorsed]: U. S. B. T. A. Filed Oct. 25, 1940.

[44]

[Title of Board and Cause.]

DESIGNATION OF PORTIONS OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN THE RECORD ON REVIEW

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare, certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, for use in connection with the petition for review by the Circuit Court of Appeals for the Ninth Circuit heretofore filed by the petitioner in the above appeal, a transcript of the record in the above appeal, prepared as required by law and by the rules of said court, and to include in said transcript of record the following documents or certified copies thereof, to wit:

1. The docket entries of all proceedings before the Board of Tax Appeals. [45]

2. Pleadings before the Board of Tax Appeals as follows:

(a) Petition for redetermination, including attached copy of deficiency notice;

(b) Answer of respondent;

(c) Application for leave to file amendment to petition and order granting same;

(d) Amendment to petition;

(e) Answer of respondent to amendment to petition, if any.

3. The findings of fact and opinion of the Board of Tax Appeals.

4. Petitioner's computation for entry of decision.

5. The decision of the Board.

6. The Petition for Review filed by petitioner in the above appeal, together with Notice of filing the same, and Proof of the service thereof.

7. Statement of Points upon which petitioner intends to rely on the review.

8. Designation of Portions of record, proceedings and evidence to be contained in the record on Review, together with proof of service of same.

Dated: October 21, 1940.

WALTER SLACK,
825 Balfour Building, San Francisco, California, Attorney for Petitioner.

[46]

[Title of Board and Cause.]

AFFIDAVIT OF SERVICE OF DESIGNATION OF PORTIONS OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN THE RECORD ON REVIEW AND OF STATEMENT OF POINTS UPON WHICH PETITIONER INTENDS TO RELY ON THE REVIEW

State of California
City and County of San Francisco—ss.

J. A. Poma, being first duly sworn, deposes and says:

That she is, and was at the time of the service hereinafter referred to, a resident of the City and County of San Francisco, State of California, and a citizen of the United States over the age of twenty-one years and not a party to nor interested in the above entitled appeal; that the address of affiant is 2265 Larkin Street, San Francisco, California.

That on the 21st day of October, 1940, affiant deposited [47] in the registered mail at the United States post office at San Francisco, California, duplicate originals of the attached Designation of portions of the Record, proceedings and evidence to be contained in the record on Review and of the Statement of Points upon which Petitioner intends to Rely on the Review in a sealed envelope addressed to J. P. Wenchel, Esq., Chief Counsel, Bureau of Internal Revenue, Internal Revenue Building,

Washington, D. C.; that at the time of such deposit affiant fully prepaid the first class postage thereon and the registry fee therefor; that at the time of such deposit there was regular communication by mail between the said City and County of San Francisco and the city of Washington, D. C.

J. A. POMA

Subscribed and sworn to before me this 21st day of October, 1940.

[Seal] CATHERINE E. KEITH

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires Oct. 20, 1942.

[Endorsed]: U. S. B. T. A. Filed Oct. 25, 1940.

[48]

[Title of Board and Cause.]

CERTIFICATE

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 48, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of

Tax Appeals, at Washington, in the District of Columbia, this 5th day of November, 1940.

[Seal] B. D. GAMBLE,
Clerk, United States Board of Tax Appeals. [49]

[Endorsed]: No. 9682. United States Circuit Court of Appeals for the Ninth Circuit. Adolph B. Spreckels, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of the United States Board of Tax Appeals.

Filed November 18, 1940.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 9682

ADOLPH B. SPRECKELS,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED

Now comes Adolph B. Spreckels, the petitioner above named, and pursuant to Rule 19 of the above

court designates the entire record contained in the transcript heretofore certified by the Clerk of the United States Board of Tax Appeals and filed in the above entitled cause on November 18, 1940, as the part of the record which petitioner thinks necessary for the consideration of petitioner's petition for review in said cause.

WALTER SLACK,
825 Balfour Building, San Francisco, California, Attorney for Petitioner.

Consented to:

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent.

[Endorsed]: Filed Nov. 25, 1940. Paul P. O'Brien, Clerk. [50]

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF THE POINTS ON WHICH PETITIONER INTENDS TO RELY

Petitioner, Adolph B. Spreckels, above named hereby adopts as a statement of the points on which he intends to rely on the above review the statement of points to be relied upon by petitioner on review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the United States Board of Tax Appeals entered on

August 5, 1940, filed in the United States Board of Tax Appeals in the above proceeding and contained in the certified transcript of the record filed in the above cause on November 18, 1940.

WALTER SLACK,
825 Balfour Building, San Francisco, California, Attorney for Petitioner.

Service of a copy of the above Statement of Points is hereby acknowledged this 22nd day of November, 1940.

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent.

[Endorsed]: Filed Nov. 25, 1940. Paul P. O'Brien, Clerk. [51]

/ 2

No. 9682

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ADOLPH B. SPRECKELS,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S OPENING BRIEF.

WALTER SLACK,
Balfour Building, San Francisco,
Attorney for Petitioner.

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No. 9682

IN THE

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For the Ninth Circuit

ADOLPH B. SPRECKELS,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S OPENING BRIEF.

OPINION BELOW.

This is a petition for review of a decision of the Board of Tax Appeals entered pursuant to findings of fact and an opinion of the Board reported in 41 B. T. A. p. 1204.

STATEMENT OF PLEADINGS AND FACTS SHOWING JURISDICTION.

Petitioner is an individual, resident in San Francisco, California. He filed his income tax return for the year 1934 with the Collector at San Francisco. (R. 24) On July 20, 1938, the respondent sent petitioner a ninety day letter proposing to assess additional income taxes for that year. (R. 9-14) On September 26, 1938, and within the time allowed by law,

petitioner appealed from said proposed assessment to the Board of Tax Appeals. (R. 2, 14) After a hearing the Board filed its findings of fact and opinion and on August 5, 1940, a decision was entered determining that there had been an overpayment of petitioner's income tax for the calendar year 1934 in the sum of $2,816.72. (R. 34) Petitioner, deeming himself entitled to a refund in the sum of $4,087.61, on October 19, 1940, filed with the Board his petition for review of the decision by this Court. (R. 3, 38)

The Board had jurisdiction of the appeal under section 272 (a) of the Revenue Act of 1938 and section 272 (a) of the Internal Revenue Code. This Court has jurisdiction of the petition for review under sections 1141 and 1142 of the Internal Revenue Code.

ABSTRACT OF CASE.

Petitioner filed his federal income tax return for 1934 on May 9, 1935, showing a net taxable income of $121,593.86 and a tax liability of $37,897.60, which was paid in installments, the last payment being made on December 16, 1935, in the amount of $9,474.40. (R. 24-25) On December 23, 1937, petitioner filed a timely claim for refund of income tax in the amount of $4,087.61 on the ground that certain stamp taxes had been paid that had not been claimed as deductions in the return. (R. 25) Thereafter respondent audited petitioner's return in conjunction with the refund claim and in a deficiency letter dated July 20, 1938, conceded the correctness of the claim with respect to

the stamp taxes with the exception of $80 thereof. However, respondent claimed that petitioner's dividend income had been understated by an amount considerably in excess of the stamp taxes paid and asserted a deficiency of $1,254.11 for the year. (R. 9-14) In due time, on September 26, 1938, a petition for redetermination was filed with the Board wherein error was assigned as to the proposed increase in petitioner's dividend income and petitioner asserted his right to a deduction for the stamp taxes covered by the refund claim of December 23, 1937. (R. 4-8) At the hearing before the Board on June 8, 1939, petitioner asked and was granted leave to file an amendment to his petition setting forth an additional error on the part of the respondent in failing to allow petitioner a deduction for selling commissions paid in connection with sales of stocks, bonds and commodities in the sum of $23,909.29. The amendment closed with a prayer for the refund of the $4,087.61 claimed in the refund claim filed on December 23, 1937, although the allowance of the additional deduction for selling commissions would have authorized a refund in excess of $15,000. (R. 18-20)

The Board after receiving testimony held that the selling commissions were legally deductible in determining petitioner's income tax liability with the result that petitioner had in fact overpaid his income tax for the year 1934 by $15,122.56. However, on the ground that the amendment assigning error in respect to the deduction for selling commissions had not been filed within three years after the payment of the last installment of tax, the Board ruled that peti-

tioner could not receive the full amount of $4,087.61 covered by the valid refund claim filed on December 23, 1937, but that the refund should be limited to $2,816.72, the amount by which petitioner had overpaid his income tax for the year if the error with reference to the allowance of selling commissions were disregarded.

The sole question involved on this petition for review is whether the Board of Tax Appeals, having determined that a taxpayer has overpaid his income tax, may limit the amount of such overpayment to be refunded, to an amount less than that covered by a valid and timely refund claim, on the ground that one of the adjustments contributing to the determination that there was an overpayment was not specified as error within three years after the payment of the last installment of tax.

SPECIFICATIONS OF ERROR.

Petitioner specifies the following errors on this petition for review:

(1) The failure of the Board to determine the amount by which petitioner overpaid his income tax for the year 1934, on the basis of the evidence before the Board;

(2) The failure of the Board to determine the portion of the overpayment of petitioner's income tax for 1934 paid within three years of the filing on December 23, 1937, of his claim for refund of income tax for that year.

SUMMARY OF ARGUMENT.

It is petitioner's position that the statute requires the Board, when it finds that a taxpayer has made an overpayment of tax for a year under consideration, to determine the amount of such overpayment without reference to any limitations on the right to refund, and, having so determined, then to determine the portion of the overpayment paid within three years before the filing of a valid claim for refund or of the petition. The matter of refund then becomes the function of the Bureau of Internal Revenue.

Petitioner also contends that the Board in performing its first function, that of determining the amount of the overpayment, is required to consider all errors specified in the petition and in any amendments thereto which the Board has permitted to be filed, regardless of the date of the filing of such amendments.

ARGUMENT.

I. STATEMENT OF FACTS AND POINTS OF LAW TO BE DISCUSSED.

The Board of Tax Appeals has found facts from which it appears that petitioner has overpaid his income tax for the year 1934 by $15,122.56. It has determined that petitioner is entitled to a refund of but $2,816.72 of this overpayment. Petitioner does not assert the right to recover the full amount of the overpayment *but only so much thereof as is covered by a valid and timely refund claim for $4,087.61.*

The statute provides that the Board, if it "finds that the taxpayer has made an overpayment of tax, * * * shall have jurisdiction to determine the amount of such overpayment", and that when the decision of the Board has become final the amount of overpayment shall "be credited or refunded to the taxpayer". The only limitation on this jurisdiction is that the Board must determine the portion of the tax "paid within three years before the filing of the claim [for refund] or the filing of the petition, whichever is earlier". Revenue Act of 1934, section 322(d); Internal Revenue Code, section 322(d).

Petitioner contends that under these statutory provisions the Board has two duties to perform in a case where it finds that a taxpayer has overpaid his income tax, viz.: (1) to determine the amount of such overpayment, (2) to determine how much of such overpayment was paid within three years before the filing of a valid claim for refund or before filing the petition with the Board.

The Board in the present case performed neither of these duties. It not only failed to find the entire amount by which petitioner had overpaid his income tax for the year, a matter that can, however, be computed from the record before this Court, but it also erroneously determined that but $2,816.72 of tax had been "paid within three years before the filing of a claim for refund", whereas the undisputed fact is that $9,474.40 in tax had been paid within three years prior to the filing of the refund claim for $4,087.61 on December 23, 1937.

Petitioner contends that under these statutory provisions the practice adopted by the Bureau of Internal Revenue in determining the amount of an overpayment of income tax properly refundable should apply, and that as required by General Counsel's Memorandum 9800, Cumulative Bulletin X-2, p. 271, "the correct tax should be calculated * * * taking into consideration all items increasing and decreasing net income regardless of the statute of limitations"; and that after this is done, the tax paid should be refunded "to the extent of the overpayment represented by the allowable items covered by timely claims when claims are necessary". (From the syllabus)

Thus considered, the petition for review does not present the question discussed in the Board's opinion as to the right to a refund by reason of an error in the determination of his tax first assigned in an amendment to the petition filed more than three years after the overpayment of tax, since petitioner throughout the case has not asserted any right to a refund in excess of the amount covered by the timely refund claim. Hence, the sole question for consideration is whether or not, in the case of an overpayment of income tax, the Board is authorized to reduce the allowable refund to an amount less than that covered by the timely claim.

II. THE PLEADINGS BEFORE THE BOARD.

For a proper understanding of the situation the pleadings before the Board will be reviewed.

(a) THE 90-DAY LETTER.

Petitioner's return for the year 1934 reported a taxable income of $121,593.86. In his notice of determination of deficiency (the 90-day Letter, so-called) respondent increased petitioner's share of certain dividends received from trustees by $9,431.67, disallowed a deduction of $700.80 for taxes paid on whiskey withdrawn from bonded warehouse, and allowed as a deduction not claimed on the return but claimed in the refund claim filed December 23, 1937, an amount representing stamp taxes paid on sales of securities and commodities. The result was an increase in taxable income to $124,507.04 and a proposal to assess a deficiency of $1,254.11. (R. 9-14)

(b) THE PETITION TO THE BOARD.

In his petition for a redetermination of this deficiency, petitioner assigned as error the action of respondent in increasing his dividend income by $9,431.67 (R. 5), and then pleaded in detail the facts concerning the payment of the stamp taxes on sales of securities and commodities, set out the dates of the payment of income tax for the year 1934, alleged the payment of an installment of $9,474.40 on December 10, 1935, and the filing on December 23, 1937, of the refund claim for the overpayment of income tax arising from the failure to deduct the stamp taxes on the original return. (R. 6-7) The respondent's answer raised issues as to the errors specified, but admitted that petitioner was entitled to a deduction of $7,219.29 for stamp taxes. (R. 15-17)

(c) AMENDMENT TO PETITION.

At the hearing before the Board in San Francisco on June 8, 1939, the errors raised in the original petition were disposed of by stipulation to the effect that $7,828.51 should be excluded from taxable income as redetermined by the respondent and the dividend credit reduced by the same amount. (R. 23-25) This resulted in an overpayment of tax, since the deficiency letter proposed a net increase in taxable income of but $2,913.18. Petitioner then moved for and was granted leave to file an amendment to his petition. (R. 2, 17-18, 21) The amendment to petition assigned an additional error in respondent's determination of income tax through his failure to allow as a deduction the sum of $23,909.29 representing selling commissions paid in connection with the sales of stocks, bonds and commodities and alleged facts supporting the assignment. (R. 18-20) The respondent filed an answer to amendment to petition consisting of a general denial of the material allegations but containing no affirmative pleading setting up any bar of the refund by reason of the limitations of the statute. (R. 21-22)

(d) THE HEARING.

The hearing was confined to the issue raised by the amendment to petition and resulted in a finding by the Board that during the year 1934 petitioner was engaged in the business of purchasing and selling stocks, bonds and commodities for profit and that in that year he paid to brokers $23,692, representing selling commissions in connection with such sales; that petitioner did not deduct the selling commissions in com-

puting the income shown in his income tax return for the taxable year, and that on petitioner's books the selling commissions were deducted from the selling price before net profit or loss was determined. (R. 24)

The Board also found that the last installment of petitioner's income tax for the year 1934 was paid on December 16, 1935, in the amount of $9,474.40 and that on December 23, 1937, petitioner filed a claim for refund of income tax in the amount of $4,087.61 on the ground that certain stamp taxes were paid that had not been claimed as deductions in the return. (R. 24-25)

III. THE BOARD ALTHOUGH FINDING PETITIONER HAD OVERPAID HIS INCOME TAX, FAILED TO DETERMINE THE AMOUNT OF OVERPAYMENT, OR THE AMOUNT PAID WITHIN THREE YEARS OF THE FILING OF A VALID REFUND CLAIM.

(a) THE DECISION.

Notwithstanding the pleadings and findings the Board entered its decision,

> "That there is an overpayment in income tax for the year 1934 in the amount of $2,816.72, which amount was paid within three years before the filing of a claim for refund. (Section 809(a) Revenue Act of 1938.)" (R. 34)

(b) OPINION OF THE BOARD.

(i) Board in effect considered itself limited to a consideration of errors assigned within statutory period for refunds.

The opinion of the Board (R. 26-31) shows that it reached its decision on the theory that it could not

allow a refund of any amount in excess of that resulting from the stipulation at the hearing, since the error in relation to the deduction of selling commissions was not assigned until more than three years after the payment of the last installment of the income tax. The Board felt constrained to this conclusion by the decisions of the Circuit Court of Appeals for the Third Circuit in *Commissioner v. Rieck,* 104 Fed. (2d) 294, and of the Circuit Court of Appeals for the Second Circuit in *Commissioner v. Dallas,* 110 Fed. (2d) 743, stating that it found no material distinction between the situations in those cases and in the present case.

Before analyzing and showing the inapplicability of the two decisions to the present facts, it will lend to a clearer appreciation of the problem if the statutory provisions relating to the jurisdiction and procedure of the Board are considered.

IV. THE STATUTE REQUIRES THE BOARD TO DETERMINE SEPARATELY THE FULL AMOUNT OF OVERPAYMENT AND THE PORTION PAID WITHIN THREE YEARS OF THE REFUND CLAIM.

(a) STATUTORY PROVISIONS.

The statutory provisions authorizing appeals to the Board and regulating procedure therein have not changed substantially under the various Revenue Acts and are now found in the Internal Revenue Code. So far as is necessary for a consideration of the present question, they read as follows:

Section 272. *Procedure in General.*

"(a) (1) *Petition to Board of Tax Appeals.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed, * * * the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final.

* * * * * * *

"(b) *Collection of Deficiency found by Board.*—If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.

* * * * * * *

"(e) *Increase of Deficiency after notice mailed.*—The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether

any penalty, additional amount or addition to the tax should be assessed—if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing."

Section 322. *Refunds and Credits.*

"(a) *Authorization.*—Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

"(b) *Limitation on Allowance.*

(1) *Period of Limitation.*—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

(2) *Limit on amount of Credit or Refund.*—The amount of the credit or refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, or, if no claim was filed, then during the three years immediately preceding the allowance of the credit or refund.

"(c) *Effect of Petition to Board.*—If the Commissioner has mailed to the taxpayer a notice of

deficiency under section 272 (a) and if the taxpayer files a petition with the Board of Tax Appeals within the time prescribed in such subsection, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except:

(1) As to overpayments determined by a decision of the Board which has become final; and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Board which has become final; and

(3) As to any amount collected after the period of limitation upon the beginning of distraint or a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Board which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive.

"(d) *Overpayment Found by Board.*—If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer. No such credit or refund shall be made of any portion of the tax unless the Board determines as part of its decision that such portion

was paid (1) within three years before the filing of the claim or the filing of the petition, whichever is earlier, or (2) after the mailing of the notice of deficiency."

Section 1111. *Rules of Practice, Procedure, and Evidence.*

"The proceedings of the Board and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Board may prescribe and in accordance with the rules of evidence applicable in the courts of the District of Columbia in the type of proceedings which prior to September 16, 1938, were within the jurisdiction of the courts of equity of said District."

(b) NO JURISDICTIONAL LIMITATIONS ON MATTERS TO BE CONSIDERED BY BOARD IN REDETERMINING A DEFICIENCY.

It is evident from the foregoing statutory provisions that there is no jurisdictional limit on the matters to be considered by the Board in redetermining a deficiency, provided only the petition is filed within the ninety-day period. The Commissioner is not even restricted to the errors raised by his deficiency letter. The only requirement for the assignment of errors by the petitioner is found in Rule 6 of the Board, specifying the contents of the petition and which, so far as that requirement is concerned, reads:

"(d) Clear and concise assignments of each and every error which the petitioner alleges to have been committed by the Commissioner in the determination of the deficiency. Issues in respect of which the burden of proof is by statute placed

upon the Commissioner will not be deemed to be raised by the petitioner in the absence of assignments of error in respect thereof. Each assignment of error shall be numbered."

(c) RULES PERMIT AMENDED PLEADINGS.

Rule 17, provides:

"Amended and supplemental pleadings.—The petitioner may, as of course, amend his petition at any time before answer is filed. After answer is filed, a petition may be amended only by consent of the Commissioner or on leave of the Board.

"All motions to amend, made prior to the hearing, must be accompanied by the proposed amendments or amended pleading.

"Upon motion made, the Board may, in its discretion, at any time before the conclusion of the hearing, permit a party to a proceeding to amend the pleadings to conform to the proof.

"When motions to amend are granted at the hearing, the amendment or amended pleading shall be filed at the hearing or with the Board within such time as the Division may fix."

It follows logically from the policy announced in Rule 17, in view of the fact that the object of the creation of the Board was to afford an opportunity for a determination of the correct tax liability, that the Board may consider any error assigned by either party in the pleadings upon which the appeal is tried.

(d) ERRORS RAISED BY AMENDMENT AT HEARING MUST BE CONSIDERED IN DETERMINING TAX LIABILITY.

Prior to the present decision, it has been the regular practice of the Board to allow amendments for the purpose of assigning additional errors in the Commissioner's determination and to consider those additional errors in determining taxpayer's income.

Appeal of Bear Manufacturing Co., 2 B. T. A. 422;

Appeal of Chicago Railway Equipment Co., 13 B. T. A. 471, 480.

While neither of these appeals involved overpayments of tax, there is no reason why any exception should be made where a consideration of the error raised by the amendment will result in an overpayment rather than a reduction in the asserted deficiency as will be discussed in more detail later in this brief.

(i) Procedure in Bureau of Internal Revenue under G. C. M. 9800 gives full effect to timely refund claims.

As has been noted, prior to the present decision, the practice in the Bureau of Internal Revenue in auditing returns had been in accord with the rule petitioner contends is required of the Board by the statutory provisions relating to overpayments found by that body, viz.: determine the correct tax liability on the basis of all facts affecting the same, then determine the amount of refund, which cannot be more than the amount of overpayment actually made, nor more than the amount covered by a timely refund claim. General Counsel's Memorandum 9800, *supra,* discusses the problem in the terms of the 1926 Act, which are for

all purposes of the present consideration substantially identical with those of the 1938 Act here involved, as follows:

> "Some doubt has arisen as to the legality of offsetting additional deductions (which are entirely proper and allowable except for the fact that they are not covered by a claim for refund or credit and for that reason could not be allowed if considered separately) against additions to income to the extent that such additions will permit an offset. * * *
>
> "The matter appears to be controlled by the express language of the statute. Section 284 (a) of the Revenue Act of 1926, so far as material, directs that 'Where there has been an overpayment of any income * * * tax * * * the amount of such overpayment shall * * * be credited against any income * * * tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.' Subdivision (b) 1 and 2 of section 284 provides:
>
> "(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and
>
> "(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim

was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

"These provisions require no complicated calculations. Plainly the purpose is to permit the refund or credit of overpaid tax where a claim is required, to the extent of the allowable items covered by the claim. The statute does not make the adjustment of overpaid tax a matter of setting off one income-adjusting item or class of items against another. The statute looks simply to (1) the correct tax ascertained by inclusion of all proper items, regardless of time limitations, and (2) the tax actually paid no matter how calculated, and contemplates that the excess of (2) over (1) shall be refunded or credited to the extent of the tax overpaid represented by the allowable items covered by timely claims when claims are necessary." (C. B. X-2, pp. 272-3)

The opinion concludes:

"Lewis et al. v. Reynolds (48 Fed. (2d) 515, Ct. D. 347, C. B. X-1, 180), decided by the United States Circuit Court of Appeals, Tenth Circuit, is not contrary to this conclusion. The court, after quoting section 284(a) of the Revenue Act of 1926, supra, and section 322 (a) and (b) of the Revenue Act of 1928, stated:

"The above-quoted provisions clearly limit refunds to overpayments. It follows that the ultimate question presented for decision, upon a claim for refund, is whether the taxpayer has overpaid his tax. This involves a redetermination of the entire tax liability. While no new assessment can be made, after the bar of the statute has fallen,

the taxpayer, nevertheless, is not entitled to a refund unless he has overpaid his tax.

"The inference of the court's statement that the taxpayer is not entitled to a refund unless he has overpaid his tax seems plainly to be that if he has overpaid his tax he is entitled to a refund. The court recognized that in order to ascertain whether there has in fact been an overpayment of tax, items of income which increase the tax must be considered as well as items of deductions which decrease the tax. The court's opinion affords no basis for assuming that the tax and overpayment may be computed to the detriment of the taxpayer by including one class of items and excluding the other class.

"It is therefore, concluded that in determining whether there has been an overpayment which may be refunded or credited, the correct tax should be calculated on the basis upon which the taxpayer filed his return, taking into consideration all items increasing and decreasing net income, regardless of the statute of limitations. The tax actually paid may be refunded or credited to the extent of the overpayment represented by the allowable items covered by timely claims when claims are necessary." (C. B. X-2, p. 274)

(ii) Commissioner v. Rieck and Commissioner v. Dallas not inconsistent.

When the facts involved in *Commissioner v. Rieck* and *Commissioner v. Dallas, supra,* are considered, the decisions are in nowise inconsistent with G. C. M. 9800 or with the construction of section 322 of the Internal Revenue Code, urged by petitioner. In truth,

if the procedure announced in G. C. M. 9800 is applied to the situations presented in the two cited cases, the result is the same as that reached by the Circuit Courts of Appeals, since while in each case there was an actual overpayment of tax, in neither was there a *valid, timely* claim for refund.

In the *Rieck* case, the taxpayer had made a timely petition to the Board wherein he claimed a refund of income tax on account of the improper inclusion in taxable income of income from an insurance trust. In the course of his appeal to the Board he "became convinced that his claim * * * was baseless and would not be, as it was not, allowed by the Board. He accordingly asked and was granted by the Board leave to amend his claim by substituting for the Insurance Trust income deduction a deduction for the Bank stock loss. This amendment was allowed September 28th, 1936. The significance of this is that the original claim was filed April 19th, 1935, within two years of the payment of the tax. The amended claim was not made until September 28th, 1936, more than two years after the payment." (104 Fed. (2d) 294)

The Circuit Court of Appeals held the refund could not be allowed, applying to a petition to the Board, the rule that a refund claim cannot be amended after the statutory period to set up a new and distinct ground for recovery, citing *United States v. Andrews,* 302 U. S. 517, 82 L. Ed. 398, and *United States v. Garbutt Oil Co.,* 302 U. S. 528, 82 L. Ed. 405. It will be noted on examination of these two authorities, that

each, as did the *Rieck* case, involved amendments bringing in new and entirely unrelated claims, in support of *invalid* claims previously asserted.

In the case of *Commissioner v. Dallas, supra,* the original petition had made no claim of overpayment, only opposing a proposed increase in income, the first claim of overpayment being asserted in an amended petition filed more than two years after the payment of the tax, asserting the improper inclusion of an item of income in the original return. There was a well-reasoned dissent to the decision that the amendment could not relate back to the date of the filing of the original petiton.

(e) PRESENT CASE INVOLVES THE AMOUNT REFUNDABLE ON A VALID AND TIMELY REFUND CLAIM.

It is accordingly not necessary to consider the validity of the reasoning in the *Rieck* and *Dallas* cases, since petitioner here is not seeking a refund by reason of error first assigned more than three years after the payment of the tax, but a refund of the amount covered by a *timely* and *valid* claim for refund asserted prior to the filing of the original petition, and reasserted in that petition which was likewise filed within the statutory period.

(i) Board has confused the requirements of Section 322 (d) of the Internal Revenue Code.

Section 322 of the Internal Revenue Code has heretofore been referred to and quoted. Its provisions are simple, and if followed literally result in the al-

lowance in full of the refund claimed by petitioner. A repetition of these provisions is sufficient to indicate this result.

> "If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency,
>
> *the Board shall have jurisdiction to determine the amount of such overpayment,*
>
> and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer."

Having done this, the amount to be refunded is then determined under the following provision of the subsection:

> "No such credit or refund shall be made of *any portion of the tax* unless the Board determines as part of its decision that *such portion* was paid (1) within three years before the filing of the claim or the filing of the petition, whichever is earlier, or (2) after the mailing of the notice of deficiency."

The statute contemplates that in a given instance the amount of overpayment may exceed the amount refundable by its reference in the second sentence to a "portion of the tax".

Had the Board here first determined the overpayment on the basis of its findings, it would have found

that petitioner had overpaid his income tax for the year 1934 by $15,122.56. Having so determined, it would then have performed its duty as required by the closing provision of the subsection and determined that $4,087.61 of that overpayment was paid within three years before the filing of the claim therefor on December 23, 1937. So determining, the refund of that amount is automatically made after the decision becomes final.

(ii) Petitioner to Board may introduce at the hearing proof in support of any error alleged in his pleadings to reduce or offset the deficiency asserted by respondent.

It has been the uniform practice of the Board to receive at a hearing proof in support of any error alleged in the petition or amended petition in order to determine whether or not there is a deficiency in petitioner's income tax for the period. The Board is expressly given "jurisdiction to redetermine the correct amount of the deficiency". (Internal Revenue Code Sec. 272(e) *supra.*)

In *Appeal of Gutterman Strauss Co.,* 1 B. T. A. 243, the Commissioner contended that the Board could consider only errors in the proposed deficiency urged before the Bureau. The Board said (p. 244):

> "But admitting that this claim was not made before the Commissioner, the Board is clearly of the opinion that it has jurisdiction to determine the point in issue. The Commissioner has found a deficiency in tax for the year 1919. It is the duty of this Board to determine whether the

amount found as a deficiency is the correct amount of the deficiency, if any.

* * * * * * *

"This Board was not created for the purpose of *reviewing rulings made by the Commissioner* but was created for the purpose of *determining the correctness of deficiencies in tax* found by the Commissioner. If the deficiency in tax found by him is greater than the true deficiency the Board has authority to decrease it; if it is less than the true deficiency, the Board has authority to increase it. (*Appeal of the Hotel DeFrance Co.*, 1 B. T. A. 28.) If a taxpayer can prove to this Board that he is entitled to a deduction from gross income, the deduction will be allowed even though it has never been claimed by the taxpayer at any hearing had before the Commissioner; otherwise it would be impossible for this Board to determine the correct amount of the deficiency."

In the *Appeal of Robert P. Hyams Coal Co., Ltd.*, 1 B. T. A. 217, the Board says (p. 220):

"Inasmuch as the deficiencies in tax for each year are before the Board for its review, the Board *takes jurisdiction of the case to consider all points raised for the purpose of reaching the correct amount of the deficiency in tax,* if any, for each of the years under review." (Italics supplied.)

In fact the refusal of the Board to permit an amendment to the petition raising new issues may be revers-

ible error. The Circuit Court of Appeals for the Second Circuit so held in *International Banding Machine Co. v. Commissioner,* 37 Fed. (2d) 660, where the evidence on the new issue had been received without objection but the Board had denied a motion to amend to conform to proof and refused to consider the error so raised. See also the decision of the Circuit Court of Appeals for the Third Circuit in *Enameled Metals Co. v. Commissioner,* 42 Fed. (2d) 213, where the Board refused leave to file an amendment raising the bar of the statute of limitations and was reversed.

Instances where the Board permitted amendment to the petition to assign additional error will be found in *Appeal of Bear Manufacturing Co.,* 2 B. T. A. 422; *Appeal of Chicago Railway Equipment Co.,* 13 B. T. A. 471, 480, heretofore cited.

Since it is the duty of the Board to determine the amount of overpayment, where there is no deficiency (Internal Revenue Code, Sec. 322(d)), there is no reason why a different rule should apply as to amendments in such a case than applies where the only question is the amount of the deficiency. As has been pointed out, the portion of the overpayment to be refunded is determined by other factors, but the Board must in all cases determine the taxable income upon all the facts presented to it whether by the original petition or by an amended petition properly filed. Having performed this function, it then proceeds to determine the portion of the overpayment refundable under the final sentence of the subdivision.

V. PLEADINGS DO NOT RAISE ISSUE OF BAR OF STATUTE.

It will be noted that the answer to amendment to petition does not raise the bar of the statute, containing only denials. While this was held immaterial in the *Rieck* case, it will be noted that the bar was pleaded in the answer filed in the *Dallas* case.

VI. SECURITY EXCHANGE REGISTRATION FEE NOT CLAIMED AS AN ALLOWABLE DEDUCTION BY PETITIONER.

In order to avoid confusion, there has been ignored throughout the discussion of the point involved, the effect on the amount of tax refundable resulting from the fact that there was included in the refund claim filed December 23, 1937, a claim for a deduction of $80 representing "securities exchange registration fee", which was not conceded to be a proper deduction by the Commissioner. It is not contended by petitioner that the amount should be allowed as a deduction and the recomputation necessary in the event of reversal can give effect thereto.

CONCLUSION.

It is submitted, in conclusion, that the Board has erred in not following the specific directions of Section 322(d) of the Internal Revenue Code; and the Board having found that there was no deficiency in petitioner's income tax for the year 1934, it should have determined the amount of overpayment, viz.,

$15,122.56, and then it should have determined that $9,474.40 thereof was paid on December 16, 1935, within three years of the filing of the refund claim for $4,087.61 on December 23, 1937.

The failure of the Board to follow this simple procedure requires a reversal.

Dated, San Francisco,
January 3, 1941.

Respectfully submitted,
WALTER SLACK,
Attorney for Petitioner.

No. 9682

In the United States Circuit Court of Appeals for the Ninth Circuit

ADOLPH B. SPRECKELS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

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OPINION BELOW

The opinion of the Board of Tax Appeals (R. 22) is reported in 41 B. T. A. 1204.

JURISDICTION

This appeal involves a claim for the refund of an overpayment in income tax for the calendar year 1934 in the amount of $4,087.61, of which $2,816.72 has been allowed by the Board of Tax Appeals. (R. 34–38.) The appeal is from a decision of the Board entered August 5, 1940 (R. 34), and is brought to this Court by a petition for review filed October 19, 1940 (R. 35–38), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

QUESTION PRESENTED

Whether the taxpayer may secure the refund of that portion of an overpayment of tax which depends upon an item of deduction claimed by the taxpayer for the first time in an amended petition filed with the Board of Tax Appeals more than three years after the payment of the tax, where he had filed a timely claim for refund based upon a different and unrelated item which was conceded in his favor and is reflected in the decision entered by the Board.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the Appendix, *infra,* pp. 18–21.

STATEMENT

The facts found by the Board of Tax Appeals (R. 24–26) and admitted by the pleadings (R. 15–17, 21–22) pertinent to this appeal may be summarized as follows:

The taxpayer, an individual who resides in San Francisco, California, filed his income tax return for the year 1934 with the Collector for the First District of California. (R. 24.)

The taxpayer was engaged in the business of purchasing and selling stocks, bonds and commodities for profit. He kept his books upon the basis of cash receipts and disbursements. In the year 1934, he paid to brokers selling commissions in the amount of $23,692 in connection with sales of stocks, bonds and commodities. Upon the taxpayer's books, the selling commissions were deducted from the selling price

before net profit or loss was determined. In making his income tax return for the year 1934, the taxpayer did not deduct the selling commissions in computing income. (R., 24.)

The taxpayer's income tax return for 1934, filed on May 9, 1935, showed a net taxable income of $121,-593.86 and a tax of $37,897.60, which was paid in instalments, the last payment being made December 16, 1935, in the amount of $9,474.40. (R. 24–25.) The taxpayer reported on this return losses of $114,249.38 from the sale of stocks and commodities, and took as a deduction $2,000. (R. 25–26.)

On December 23, 1937, the taxpayer filed a claim for refund of income tax in the amount of $4,087.61, on the ground that certain stamp taxes were paid that had not been claimed as deductions in the return. With the exception of $80, this claim was allowed in the determination of the Commissioner in a deficiency letter dated July 20, 1938. (R. 13–14, 24–25.)

In the statement attached to the deficiency letter of July 20, 1938, it was shown that the adjustments which resulted in the deficiency were (1) an increase in the amount of dividends reported by the taxpayer as the beneficiary of a certain trust; (2) the disallowance of a deduction of $16,967.02 for interest paid by the trustees of the trust on income tax deficiencies of the estate of the decedent, who had created the trust; (3) the disallowance of a deduction of $700.80 for taxes paid on whisky withdrawn from bonded warehouses. (R. 11–13.)

On September 26, 1938, the taxpayer filed a petition to the Board of Tax Appeals. (R. 25.) This petition

alleged as the sole error on the part of the Commissioner the increasing of the taxpayer's distributive share of the income from the trust created under the will of Adolph B. Spreckels, deceased. (R. 5.) The petition further recited that the taxpayer during the calendar year 1934 had sold stocks, bonds and commodities, and had paid stamp taxes on these sales, in the amount of $7,219.29, which the taxpayer had failed to deduct in computing his taxes for the calendar year 1934. The petition recited that the taxpayer had filed a claim for refund of $4,087.61, income tax overpaid, for the calendar year 1934 by reason of his failure to deduct these stamp taxes; that the Commissioner had conceded in the deficiency letter transmitted to the taxpayer that the taxpayer was entitled to the deduction for these stamp taxes, and that by reason of the taxpayer's right to take this deduction, he was entitled to a refund on account of his income tax for the year 1934 in the sum of $3,650.36. (R. 6–7.)

The Commissioner, in his answer to the petition, admitted the allegation that the taxpayer was entitled to a deduction of $7,219.29 in 1934 for stamp taxes paid. (R. 16–17.)

On June 8, 1939, the taxpayer was granted leave by the Board to amend his petition to allege that during the year 1934 taxpayer paid selling commissions in the amount of $23,909.29 in connection with sales of stocks, bonds and commodities; that these commissions paid by the taxpayer were not taken as a deduction in computing the taxpayer's income for that year, and that the Commissioner erred in not allowing as a deduction in his determination of the taxpayer's income the amount

of commissions so paid by the taxpayer. (R. 17–21.)

The prayer of the amended petition was that the Board should determine that the taxpayer had overpaid his income tax for the year 1934 in the sum of $4,087.61. (R. 20.)

The error alleged in the original petition was disposed of by stipulation at the trial before the Board. (R. 23.) The Board stated that two questions were presented by the amended petition filed on June 8, 1939: first, whether a trader in securities may deduct, as an ordinary and necessary business expense, selling commissions paid by him; and second, whether a claim for overpayment set forth in an amended petition filed more than three years after payment of the last instalment of tax is timely. (R. 23.) The Board held that the taxpayer was entitled to a deduction for the selling commissions, and found that the taxpayer had overpaid his tax for the year 1934. The Board further held, however, that only $2,816.72 of this overpayment might be refunded, and that the balance of the overpayment, which resulted from the allowance of the deduction claimed for the first time in the amended petition, was barred by the statute of limitations because of the failure of the taxpayer to assert a proper claim therefor within three years of the last payment of tax. (R. 26–31, 34.)

SUMMARY OF ARGUMENT

I

This case is an appeal by the taxpayer from a determination by the Board of Tax Appeals that the taxpayer had overpaid his tax for the year 1934, but

that part of this overpayment was barred by statute from being refunded to the taxpayer. The amount of the overpayment which the Board held was barred depends solely upon the allowance by the Board of a deduction for brokerage commissions. In case No. 9687, which involves the year 1935 and which comes to this Court on the Commissioner's petition for review, the Government contends that the taxpayer is not entitled to deduct brokerage commissions as an ordinary and necessary business expense. The Government takes a similar position in the present case as a ground for upholding the Board's decision for the year 1934, and respectfully refers to its brief in case No. 9687 for a discussion of the taxpayer's right to the claimed deduction. If the Government is upheld in this contention, it will be unnecessary to consider whether the Board was correct in holding that the overpayment was barred from refund.

II

In any case which goes to the Board of Tax Appeals on a petition for the redetermination of a deficiency asserted by the Commissioner, the Board is given jurisdiction to determine that there has been an overpayment rather than an underpayment of tax. The statute, however, provides that no credit or refund shall be made of any portion of the tax determined to have been overpaid unless the Board determines as part of its decision that it was paid within three years before the filing of the claim or the filing of the petition, whichever is earlier.

In the present case the taxpayer asserted a right to the deduction for brokerage commissions, which gives rise to the portion of the overpayment in question on this appeal, for the first time in an amended petition filed with the Board more than three years after the payment of his tax for 1934. The taxpayer does not rely upon the amended petition as a timely assertion of his right to a refund of the overpayment, but places sole reliance upon a claim for refund filed by him. This claim was timely filed, but it was specific in stating only one ground for refund; namely, that the taxpayer was entitled to a deduction for stamp taxes. The deduction claimed in the refund claim has been allowed the taxpayer and is reflected in that part of the overpayment determined by the Board to be refundable. The refund claim does not constitute a timely and proper claim for the refund of the portion of the overpayment of tax which depends upon the new and unrelated ground asserted for the first time in the amended petition. The Board was accordingly correct in holding that the portion of the overpayment dependent upon the new issue was barred from refund.

ARGUMENT

I

Introduction

The petition which the taxpayer filed with the Board of Tax Appeals related to asserted deficiencies in taxes for two years, 1934 and 1935. In an amendment to the petition, the taxpayer raised for the first time the question whether he was entitled to deduct from gross in-

come as an ordinary and necessary business expense amounts paid as brokerage commissions on sales of securities. This question is applicable to both years and was decided by the Board in favor of the taxpayer. The other questions bearing upon the tax liability of taxpayer were settled by stipulation.

For the taxable year 1935, the Commissioner has filed a petition for review, docketed in this Court as case No. 9687, in which he urges that the Board's decision with respect to the brokerage commissions is erroneous.

The present appeal is by the taxpayer from the decision of the Board for the year 1934 determining that the taxpayer had overpaid his tax for that year, but that part of the overpayment was barred by statute from being refunded. The portion of the overpayment which the Board held was barred from refund depends solely upon the allowance which was made by the Board of the deduction for brokerage commissions on sales of securities, and the portion which it held was refundable results from the other issues settled by stipulation.

As a ground for sustaining the final decision of the Board in the present case, the Commissioner submits that the brokerage commissions on sales of securities are not deductible as an ordinary and necessary business expense, and respectfully refers to his brief in case No. 9687 for a discussion of that question. If the Commissioner's position on that question should be upheld by this Court, it will mean that the portion of the overpayment involved in the present appeal will be wiped out, and therefore it will be unnecessary for this Court to pass upon the further question presented by the tax-

payer in this case, which we discuss below, as to the correctness of the Board's holding that the portion of the overpayment dependent upon the issue of brokerage commissions is barred from refund.

II

No proper and timely claim or petition for overpayment of tax in excess of $2,816.72 was filed by the taxpayer, and hence the Board properly limited the refundible portion of the overpayment to that amount

Section 272 of the Revenue Act of 1934, *infra,* p. 18, provides for the filing with the Board of Tax Appeals of a petition for a redetermination of any deficiency asserted by the Commissioner.[1] Section 322 (d) of that Act provides that if the Board finds that there is no deficiency, and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year for which the Commissioner has determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall be credited or refunded to the taxpayer. That subdivision further provides:

> No such credit or refund shall be made of any portion of the tax unless the Board determines as part of its decision that it was paid within three years before the filing of the claim or the filing of the petition, whichever is earlier.

The Commissioner concedes that the taxpayer overpaid his tax for 1934 in the amount of $2,816.72 and that this amount is refundible, as found by the Board.

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[1] Substantially the same statutory provisions referred to herein are contained in the Internal Revenue Code under the same section numbers.

Whether there is any overpayment in excess of that amount depends upon whether the taxpayer is entitled to a deduction as an ordinary and necessary business expense of amounts paid by him for brokerage commissions on sales of securities. The Board decided that the taxpayer was entitled to this deduction for the brokerage commissions. Since it further held, however, that no part of the overpayment resulting from this deduction could be refunded, it did not make a computation of the total amount by which the taxpayer had overpaid his tax. For the purposes of the question on this appeal, we may assume that the taxpayer has correctly computed (Br. 5) the amount to be $15,122.56.

The taxpayer did not take the deduction for brokerage commissions in his return for 1934, but first asserted a right to that deduction by an amended petition filed with the Board on June 8, 1939, which was more than three years after the payment of the last instalment of his tax for 1934. The taxpayer implicitly concedes (Br. 5, 7, 22) that the amended petition does not relate back to the filing of the original petition with the Board, and accordingly he does not seek a refund of the entire amount by which he says he has overpaid his tax. This concession by the taxpayer is in recognition of the uniform holding of the courts and the Board that an amended petition filed more than three years after payment of tax asserting for the first time a ground which results in the determination of an overpayment will not support the refunding of that overpayment. *Commissioner* v. *Rieck,* 104 F. (2d) 294 (C. C. A. 3rd), certiorari denied, 308 U. S. 602; *Com-*

missioner v. *Dallas' Estate,* 110 F. (2d) 743 (C. C. A. 2nd); *Denholm and McKay Co.* v. *Commissioner,* 41 B. T. A. 986.

The taxpayer places sole reliance upon the claim for refund which he filed on December 23, 1937, and limits the amount which he seeks to recover to the $4,087.61 sought in that claim. The claim itself was timely, but it stated as the specific ground for refund that certain stamp taxes had been paid by the taxpayer which he had failed to take as deductions in his income tax return. The Commissioner conceded in the determination of the deficiency from which the taxpayer appealed to the Board, as well as in his answer filed with the Board, that the taxpayer was entitled to the deduction for stamp taxes, which formed the basis of the refund claim. In the computation of the overpayment of $2,816.72 which the Board has found to be refundible, the taxpayer has been allowed a deduction for the full amount of the stamp taxes. The fact that the Board found a refundible overpayment of $2,816.72 rather than an overpayment of $4,087.61 as claimed by the taxpayer, or a deficiency as originally asserted by the Commissioner, was due to adjustment pursuant to stipulation of gross income to an amount greater than originally reported by the taxpayer but less than determined by the Commissioner in his deficiency notice.

Since the overpayment of $2,816.72 determined by the Board to be refundible reflects an allowance to the taxpayer of all adjustments which he sought in his claim for refund, we submit that the Board was correct in the present case in holding (R. 29, 30) that the

original refund claim was disposed of and that the taxpayer should not be heard to rely upon that claim to support the refunding to him of the portion of the overpayment of tax dependent upon a new and entirely unrelated matter not referred to in the claim.

Article 322–3 of Treasury Regulations 86, promulgated under the Revenue Act of 1934, *infra,* p. 20, provides that a claim for refund must set forth in detail each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner of the exact basis of the claim. That article further provides:

> No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed prior to the expiration of such period. A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund.

Earlier and later regulations are to the same effect. Art. 1253, Treasury Regulations 77, promulgated under Revenue Act of 1932; Art. 322–3, Treasury Regulations 94, promulgated under Revenue Act of 1936; Art. 322–3, Treasury Regulations 101, promulgated under Revenue Act of 1938; Sec. 19.322–3, Treasury Regulations 103, promulgated under Internal Revenue Code. These regulations must be deemed to have received the approval of Congress. See *Helvering* v. *Reynolds Co.,* 306 U. S. 110; *Morrissey* v. *Commissioner,* 296 U. S. 344.

It is well settled that in a suit in the District Court or in the Court of Claims by a taxpayer for the recovery of an alleged overpayment of tax, no recovery may be had upon a claim for a refund which sets forth a specific ground different from that asserted in the suit. *United States* v. *Andrews,* 302 U. S. 517; *United States* v. *Garbutt Oil Co.,* 302 U. S. 528; *Pelham Bell Co.* v. *Carney,* 111 F. (2d) 944 (C. C. A. 1st); *Marks* v. *United States,* 98 F. (2d) 564 (C. C. A. 2d); *Livermore* v. *Miller,* 94 F. (2d) 111 (C. C. A. 5th); *Dysart* v. *United States,* 95 F. (2d) 652 (C. C. A. 8th). It is also settled that a timely claim for refund setting forth a specific ground may not be amended to assert a new and different ground after the statutory period for the filing of claims has run. *United States* v. *Andrews, supra; United States* v. *Garbutt Oil Co., supra.*

The fact that in a suit for the recovery of an overpayment of tax the amount sought to be recovered is limited to the amount stated in a timely claim for refund does not entitle the taxpayer to recover where the ground of suit is different from the ground of the refund claim. Thus, in the *Garbutt Oil Co.* case, *supra,* the taxpayer had filed a timely claim for refund for $3,105.65 based upon a specific ground. He brought suit for this amount, and at the trial the grounds of the refund claim originally filed were abandoned and recovery was sought upon the basis of a statement filed with the Commissioner after the expiration of the statutory period of limitation. The Supreme Court held that both the Commissioner and the courts were without authority to grant the refund.

It is clear therefore that the claim for refund upon which the taxpayer relies in the present case would not have supported the recovery of the amount sought if the suit had been one in the District Court or in the Court of Claims. The claim was specific in stating as the ground the right of the taxpayer to a deduction for stamp taxes paid by him. That deduction was allowed to the taxpayer. The amount here sought is based upon an asserted right to a deduction for brokerage commissions paid by the taxpayer, which deduction was claimed by the taxpayer for the first time more than three years after he had paid his tax for the year 1934. There is no reason to believe that a claim for refund which will not support a recovery in a suit in the District Court or the Court of Claims will support the refunding of an overpayment of tax where the proceeding is in the Board of Tax Appeals. Indeed, the reasoning of the courts in *Commissioner* v. *Rieck, supra,* and *Commissioner* v. *Dallas' Estate, supra,* holding that an amended petition filed with the Board after the expiration of the period for filing claims, asserting for the first time a ground which results in the determination of an overpayment, will not support the refunding of the overpayment, was based upon the analogy to the amendment of claims for refund; and the courts held that the decisions of the Supreme Court in the *Andrews* and *Garbutt Oil* cases, *supra,* were decisive of the question before them. The principles announced by the Supreme Court in the *Andrews* case and the *Garbutt Oil* case are of even clearer application in the instant case than they were in the *Rieck* and *Dallas* cases. As stated in the Regulations, a claim for

refund is considered a proper claim only as to the grounds set forth in the claim. We submit, accordingly, that the Board of Tax Appeals was correct in holding that the taxpayer might not rely upon the claim for refund as a basis for the refunding to him of the alleged overpayment.

The taxpayer argues (Br. 17) that, prior to the present decision, the practice in the Bureau of Internal Revenue had been in accord with the rule which he contends should be followed by the Board; namely, that the correct tax liability should first be determined on the basis of all the facts affecting that liability, and that the amount of the refund should then be determined, which cannot be more than the amount of overpayment actually made nor more than the amount covered by a timely refund claim. The taxpayer states that the rule followed in the Bureau is set forth in G. C. M. 9800, X–2 Cum. Bull. 271 (1931). We may assume in the present case that the correct tax liability of the taxpayer is to be determined by the inclusion of all proper items both of income and of deduction, regardless of time limitations, and that the difference between the result of this computation and the tax actually paid by the taxpayer constitutes an overpayment. The question here, however, is what portion, if any, of that overpayment may be refunded to the taxpayer. As we have pointed out above, the decisions uniformly hold that only the part of the tax overpaid which is represented by items set forth in timely claims for refund may be refunded. This rule is stated several times in G. M. C. 9800, to which the taxpayer refers, and an analysis of the computations made in the

ruling will show that only the portion of the overpayment depending upon items contained in timely claims for refund were held to be refundible. The ruling ends with the statement—

> The tax actually paid may be refunded or credited to the extent of the overpayment represented by the allowable items covered by timely claims when claims are necessary.

Moreover, the Bureau practice as to the granting of refunds is clearly set forth in the Treasury Regulations to which we have referred above.

At pp. 22–26 of the taxpayer's brief, there is a discussion of the duty of the Board to determine the amount of overpayment, and it is stated (Br. 23–24) that had the Board here first determined the overpayment on the basis of its findings, it would have found that the taxpayer had overpaid his income tax for the year 1934 by $15,122.56. As we have heretofore stated, it may be assumed upon this appeal that if the Board had made the actual computation pursuant to its findings, it would have determined that the taxpayer had overpaid his tax in the sum stated by the taxpayer. The actual amount of the overpayment, however, becomes immaterial in view of the Board's holding that it could not in any event be refunded to the taxpayer. The holding of the Board in this latter respect was correct and should be affirmed.

The taxpayer suggests (Br. 27) that the answer to the amendment to the petition does not raise the bar of the statute. Whether the answer did or did not raise the point is immaterial. Before the taxpayer is entitled to a refund of any portion of an overpayment of tax, he

must show that he has complied with the statutory requirement as to the filing of a proper claim or petition for such overpayment. The statute is mandatory and may not be waived by the Commissioner. *United States* v. *Garbutt Oil Co., supra; Commissioner* v. *Rieck, supra.*

CONCLUSION

The decision entered by the Board of Tax Appeals is correct and should be affirmed.

Respectfully submitted.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
LEE A. JACKSON,
Special Assistants to the Attorney General.

FEBRUARY, 1941.

APPENDIX

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 272. PROCEDURE IN GENERAL.

(a) *Petition to Board of Tax Appeals.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 90 days after such notice is mailed (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. * * *

* * * * *

(e) *Increase of Deficiency After Notice Mailed.*—The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount or addition to the tax should be assessed—if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing.

* * * (U. S. C., Title 26, Sec. 272.)

SEC. 322. REFUNDS AND CREDITS.

(a) *Authorization.*—Where there has been an overpayment of any tax imposed by this title, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

(b) *Limitation on Allowance.*—

(1) *Period of Limitation.*—Unless a claim for credit or refund is filed by the taxpayer within

three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

(2) *Limit on Amount of Credit or Refund.*—The amount of the credit or refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, or, if no claim was filed, then during the three years immediately preceding the allowance of the credit or refund.

(c) *Effect of Petition to Board.*—If the Commissioner has mailed to the taxpayer a notice of deficiency under section 272 (a) and if the taxpayer files a petition with the Board of Tax Appeals within the time prescribed in such subsection, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

(1) As to overpayments determined by a decision of the Board which has become final; and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Board which has become final; and

(3) As to any amount collected after the period of limitation upon the beginning of distraint or a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Board which has become final, as to

whether such period has expired before the notice of deficiency was mailed, shall be conclusive.

(d) *Overpayment Found by Board.*—If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer. No such credit or refund shall be made of any portion of the tax unless the Board determines as part of its decision that it was paid within three years before the filing of the claim or the filing of the petition, whichever is earlier.

* * * (U. S. C., Title 26, Sec. 322.)

Treasury Regulations 86 (promulgated under Revenue Act of 1934):

ART. 322–3. *Claims for refund by taxpayers.*—Claims by the taxpayer for the refunding of taxes, interest, penalties, and additions to tax erroneously or illegally collected shall be made on Form 843, and should be filed with the collector of internal revenue. A separate claim on such form shall be made for each taxable year or period. The claim must set forth in detail and under oath each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed prior to the expiration of such period. A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund. With re-

spect to limitations upon the refunding or crediting of taxes, see article 322–6.

* * * * *

ART. 322–7. *Limitations upon the crediting and refunding of taxes paid.*— * * *

(b) In any case where a person having a right to file a petition with the Board of Tax Appeals with respect to a deficiency in income tax imposed by the Act files such petition within the prescribed time, no credit or refund of the tax for the year to which the deficiency relates shall be allowed or made, and no suit for the recovery of any part of such tax shall be instituted by the taxpayer, except that—

(1) If the Board finds that there is no deficiency but that the person has overpaid his tax for the year to which the notice of deficiency relates, and the decision of the Board as to the amount overpaid has become final (see section 1005 of the Revenue Act of 1926), the overpayment shall be credited or refunded, but no such credit or refund shall be made of any portion of the tax unless the Board determines as part of its decision that it was paid not earlier than three years before the filing of the refund claim therefor or the filing of the petition, whichever event occurs first in point of time, or if no claim is filed, not earlier than three years before the filing of the petition.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1941

No. 9682

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ADOLPH B. SPRECKELS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S REPLY BRIEF.

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IN THE

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COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S REPLY BRIEF.

Respondent first contends that the decision of the Board should be upheld, not upon the grounds assigned in the Board's opinion, but for the reason that petitioner is not entitled to a deduction for broker's selling commissions as a business expense in any event, referring to his brief in Commissioner v. Spreckels, No. 9687 in this Court. Petitioner's answer to that contention will likewise be found in his brief in that proceeding.

As to the question presented in petitioner's opening brief, viz.: the proper determination of the refund allowable on a timely refund claim, it is evident, from a reading of the brief for respondent, that the parties are in accord as to the law and facts and that the

only problem before the Court is the application of the former to the latter.

We start with the premise that, on the record, petitioner has overpaid his income tax for the year 1934 in the sum of $15,122.56 and that he made a timely and valid refund claim for $4,087.61. Petitioner claims he should recover the amount covered by the claim. Respondent contends the recovery is limited to $2,816.72 as determined by the Board.

APPLICATION OF G. C. M. 9800 REQUIRES REFUND OF FULL AMOUNT COVERED BY PETITIONER'S REFUND CLAIM.

Let us consider the problems presented in G. C. M. 9800, X-2 Cumulative Bulletin 271 and then substitute the facts of the present case and note the result. Two years were involved in the memorandum, 1923 and 1925.

"The items in question are as follows:

"1923.	xdollars	
Net income as previously adjusted		83.60
Add: (1) Decrease in allowance of deduction for British taxes		27.01
		110.61
Deduct:	xdollars	
(2) Head office expenses allowed	72.48	
(3) Additional depreciation allowed	.92	
(4) Increase in reserve for unearned premiums	42.50	115.90
Revised net income (loss)		5.29

"Item (2) is covered by a claim for refund, but items (3) and (4) are not covered by a claim and the statutory period for filing further claims has expired.

"1925	xdollars
Net income as previously adjusted	128.30
Add:	
(1) Decrease in reserve for unearned premiums	27.47
(2) Furniture and fixtures disallowed as an expense	9.26
(3) Decrease in allowance of deduction for British taxes	4.17
	169.20
Deduct:	xdollars
(4) Head office expenses allowed	74.73
(5) Additional depreciation allowed	.69
	75.42
Revised net income	93.78

"Item (4) is covered by a claim for refund, but item (5) is not covered by a claim and the statutory period for filing further claims has expired.

"The question involved is stated as follows:

"May the deductions referred to above which are not covered by a claim be allowed legally as deductions from income (even though the statute of limitations for filing further claims has run) to the extent of the additions made to income, thus being allowed as offsets against the additions, although the statute

of limitations for levying additional assessments has run?

* * * * * * *

"It is accordingly consistent and appropriate in the instant case to determine the correct income regardless of the statute of limitations. As the tax was paid upon the 'net income as previously adjusted', there should be subtracted therefrom the 'revised net income' to obtain the excess amount on which the tax was paid. Credit or refund may be made of the tax paid on so much of such excess amount as is covered by a timely claim. Therefore, on the basis of the figures for 1923, the credit or refund may be calculated as follows:

	x dollars
Net income as previously adjusted	83.60
Revised net income	0.00
Income on which excess tax was paid	83.60
Income, the tax on which is covered by a claim	72.48
Income, the tax on which is not covered by a claim	11.12

"Since the amount of income on which excess tax was paid, 83.60x dollars, exceeds the amount of income the tax on which is covered by the claim, 72.48x dollars, the tax paid on the latter amount may be credited or refunded. The tax paid on 11.12x dollars, not covered by a timely claim, may not be refunded or credited.

"The calculation on the basis of the figures shown for 1925 is as follows:

	x dollars
Net income as previously adjusted	128.30
Revised net income	93.78
Income on which excess tax was paid	34.52
Income, the tax on which is covered by a claim	74.73

"Since the amount covered by a claim, 74.73 x dollars, exceeds the amount on which excess tax was paid, 34.52x dollars, the tax on the latter amount may be credited or refunded." (C. B. X-2, pp. 272-3.)

Illustrating the present case in the same form, we have the following result:

Net income as disclosed by return (R. 11)		$121,593.86
Add:		
(1) Unallowable deductions and additional income—$9,431.67 shown in 90 day letter (R. 11) less $7,828.51 as stipulated (R. 25)		1,603.16
		$123,197.02
Deduct:		
(2) Stamp taxes paid (R. 13)	$ 7,219.29	
(3) Broker's selling commissions (R. 24)	23,692.00	30,911.29
Revised net income		$ 92,285.73

Item (2) is covered by a claim for refund, but item (3) is not covered by a claim, and the statutory period for filing further claims has expired.

The tax was paid on the income disclosed by the return, so, in accordance with G. C. M. 9800, "there should be subtracted therefrom the 'revised net income' to obtain the excess amount on which the tax was paid".

Net income as disclosed by return	$121,593.86
Revised net income	92,285.73
Income on which excess tax was paid	$ 29,308.13
Income, the tax on which is covered by a claim	7,219.29
Income, the tax on which is not covered by a claim	$ 22,088.84

Paraphrasing G. C. M. 9800, since the amount of income on which excess tax was paid, $29,308.13, exceeds the amount of income the tax on which is covered by the claim, $7,219.29, the tax paid on the latter amount may be credited or refunded. The tax paid on $22,088.84, not covered by a timely claim, may not be refunded or credited.

It is submitted the application of G. C. M. 9800 demonstrates that petitioner is entitled to a refund of the full amount of income tax paid by reason of the failure to claim a deduction for the stamp taxes covered by the valid and timely claim for refund.

SAME RESULT ATTAINS FROM APPLICATION OF SECTION 322 (d) INTERNAL REVENUE CODE.

As was pointed out in petitioner's opening brief, section 322 (d) of the Internal Revenue Code requires the Board, if it "finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax, * * * to determine the amount of such overpayment", viz., in the present case $15,-122.56. The section then requires the credit or refund of such portion of the tax as was paid within three years before the filing of the claim, which literally would be $9,474.40 in this case. Petitioner, however, concedes, for the purpose of this review, that there is an additional limitation on the credit or refund to the amount covered by the claim when it is less than the portion of the tax paid within the three years, viz., $4,087.61.

It is submitted the decision of the Board should be reversed with directions to allow petitioner a refund of the full amount covered by his claim.

Dated, San Francisco,
February 19, 1941.

Respectfully submitted,
WALTER SLACK,
Attorney for Petitioner.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ADOLPH B. SPRECKELS, *Petitioner,* vs. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	No. 9682
COMMISSIONER OF INTERNAL REVENUE, *Petitioner,* vs. ADOLPH B. SPRECKELS, *Respondent.*	No. 9687

RESPONDENT'S PETITION FOR A REHEARING.

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COMMISSIONER OF INTERNAL REVENUE, *Petitioner,* vs. ADOLPH B. SPRECKELS, *Respondent.*	No. 9687

RESPONDENT'S PETITION FOR A REHEARING.

To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

On May 15, 1941, a decision of your Court was entered in the above proceedings for review of decisions of the United States Board of Tax Appeals, affirming the decision in number 9682 and reversing the decision in number 9687. The petitioner in number 9682 and respondent in number 9687, hereinafter referred to as the "taxpayer", feeling that the decision ren-

dered does not give full consideration and effect to the law applicable to the points discussed, respectfully petitions the Court for a rehearing and reconsideration of the Court's decision.

DEDUCTIBILITY OF SELLING COMMISSIONS.

The Court has reversed the holding of the Board of Tax Appeals that *selling* commissions are deductible by one engaged in the business of purchasing and selling stocks, bonds and commodities for profit, announced not only in the present cases but also in its decisions in the *Appeal of Alice du Pont Oritz,* 42 B. T. A. 173, *Appeal of George W. Covington,* 42 B. T. A. 601, *Appeal of Bernon S. Prentice,* decided December 6, 1940, and not officially reported, and *Appeal of Roland L. Taylor, Trustee,* 44 B. T. A. No. 61, decided May 1, 1941. The reversal is placed primarily on the proposition that the Court finds no compelling reason for treating selling commissions differently from purchasing commissions which, on the authority of *Helvering v. Winmill,* 305 U. S. 79, 83 L. Ed. 52, 59 Sup. Ct. 45, are concededly non-deductible, so far as sales of securities are concerned. Petitioner believes there is such compelling reason and that the decisions of the Second Circuit in *Winmill v. Commissioner,* 93 Fed. (2d) 494 and *Neuberger v. Commissioner,* 104 Fed. (2d) 649, distinguishing between purchasing and selling commissions and holding the latter deductible, should be followed.

I. REGULATIONS PROVIDED FOR DIFFERENT TREATMENT OF PURCHASING AND SELLING COMMISSIONS AND AUTHORIZE DEDUCTION OF LATTER.

The provisions of the revenue acts and of the regulations will not be repeated here since it is conceded that during the period involved on these appeals, the regulations provided that commissions on the sales of securities were deductible when they were "an ordinary and necessary business expense". (Reg. 86, Art. 24-2.) The Board found that taxpayer "was engaged in the business of purchasing and selling stocks, bonds and commodities for profit". (R. p. 21.) It would seem *prima facie* that the Board properly reached the conclusion that the selling commissions paid by taxpayer were deductible.

The Commissioner, however, ignoring the fact that sales of "commodities" were also involved and that his authorities dealt only with sales of "securities", urged and this Court has ruled, that such commissions were an ordinary and necessary business expense only in the case of "dealers", that the record did not find taxpayer to be a dealer and hence the deduction was not allowable. This is the fundamental basis for the Court's decision and it is believed that it is untenable for several reasons.

1. Undue weight has been given G. C. M. 15430.

The regulations do not attempt to declare when commissions on sales of securities are an ordinary and necessary business expense and when they are not. Logically, it would seem that where a taxpayer is in the business of buying and selling securities for profit and it is necessary to the ordinary conduct of

that business that he pay selling commissions, he comes within the regulation. Furthermore, if the Commissioner intended otherwise, it was clearly within his power to say so in his regulations and it is difficult, if not impossible, to understand why he should require an opinion of the General Counsel to tell him that his regulations did not mean what they said, but had some hidden limitation.

The Court in its opinion, however, states with reference to G. C. M. 15430, XIV-2 Cum. Bull. 59, the only authority for limiting the deduction to "dealers",

> "We are moved to comment that the interpretation of the regulations by the Assistant General Counsel of the Bureau of Internal Revenue appears intelligent, logical, and reasonable. Moreover, it is but the statement of a long-continued construction of the law and regulation by the administrative officers charged with the enforcement thereof."

That memoranda of the General Counsel and other informal rulings of the Bureau do not have the effect of Treasury Decisions or Regulations, has been repeatedly noted by the Courts. This Court in *Santa Monica Mountain Park Co. v. United States,* 99 Fed. (2d) 450, 457 says:

> "The fact that the General Counsel for the Bureau of Internal Revenue in his memorandum gave his opinion that the decision in the Liberty Bank Case, supra, was correct and that a charge off, 'being a technical requirement, may be made after the taxable year', is not persuasive. Such memoranda and other informal rulings 'have

> none of the force or effect of Treasury Decisions and do not commit the Department to any interpretation of the law.' See *Helvering v. New York Trust Co.,* supra [292 U. S. 455, 468, 78 L. ed. 1361, 1368, 54 S. Ct. 806]; *Cole v. Commissioner,* 9 Cir., 1935, 81 F. 2d 485, 104 A. L. R. 420; *Pictorial Review Co. v. Helvering,* 1934, 63 App. D. C. 21, 68 F. 2d 766."

Also, as suggested by this Court in *Cole v. Commissioner,* cited in the above quotation, the only evidence of a "long-continued construction of the law and regulation by the administrative officers", is this very memorandum itself.

It is submitted that G. C. M. 15430 is entitled to no more weight in the determination of the question before the Court than had its proposition been advanced for the first time in the Commissioner's briefs on these appeals.

2. Record contains no material to which Court can apply G. C. M. 15430.

The submission just made leads logically to the proposition that there is no basis in the record for arguing that taxpayer's method of doing business is such that selling commissions are not a necessary and ordinary expense of that business, or that there is a distinction in that regard as between so-called "dealers" and "traders". The Board found that selling commissions paid by taxpayer were deductible as an ordinary and necessary expense of taxpayer's business of buying and selling securities and commodities. The record of the trial was not preserved or presented to this Court. The Court, however, has

assumed, over taxpayer's protest, that taxpayer was not a dealer and further it is assumed, without any support from the record, that "dealers" have a peculiar problem as to selling commissions because they *may* inventory their securities and therefore have burdensome accounting problems making impossible the charge of selling commissions to particular transactions. A "dealer" is defined as a "merchant of securities" engaged in the purchase of securities and their "resale to customers". (Reg. 86, Art. 22 (c)-5.) Since anyone in the business of buying and selling for profit must of necessity find customers either through brokers or otherwise, evidently the distinction intended is that a "dealer" sells directly to his customers. If that be the case, he should have no difficulty in handling his accounting of "selling commissions" as it is impossible to see where there would be any occasion for paying them. It is submitted the record before the Court is insufficient to warrant an application of the argument in G. C. M. 15430 even if it be valid, and that the Board's decision should be affirmed if it can be sustained on any conceivable set of facts consistent with the findings.

II. WINMILL AND NEUBERGER CASES.

1. Decisions of the Circuit Court of Appeals for the Second Circuit.

The Court has declined to follow the decisions of the Circuit Court of Appeals for the Second Circuit (*Winmill v. Commissioner and Neuberger v. Commissioner, supra*) holding *selling* commissions de-

ductible, remarking the absence of discussion of that point since the decision of the Supreme Court in the *Winmill* case holding *purchasing* commissions not deductible. As the Circuit Court had held deductible both purchasing and selling commissions in the *Winmill* case and the government had seen fit to limit its petition for certiorari to *purchasing* commissions and had, further, on the coming down of the remititur from the Supreme Court, consented to the amendment of the remititur to the Board to allow the deduction of selling commissions (see Appendix), the Circuit Court doubtless regarded the point adequately supported by the distinction found in the regulations and felt that it required no further discussion.

2. Supreme Court's reliance upon Helvering v. Union Pacific Co. does not require holding selling commissions not deductible.

In its decision in the *Winmill* case the Supreme Court quoted with approval from its decision in *Helvering v. Union Pacific Railroad Co.,* 293 U. S. 282, 286, 79 L. ed. 363, 366, 55 S. Ct. 165, a statement to the effect that the consistent treatment by the regulations of commissions paid for marketing bonds not as items of current expense but as deductions from the proceeds of sale, coupled with the re-enactment of the statutory provisions without change, had the effect of establishing that treatment as law, and so held that the regulation required the disallowance of purchasing commissions on securities as an item of expense. In so holding the Court said, in response to the suggestion of inconsistency between that result and the provision in Regulation 77, Article 121, in-

cluding "commissions" among items of business expenses:

> "Special provisions limit the application of those of a broad and general nature relating to the same subject. The special designation of security purchase commissions as a 'part of the cost price of such securities' contained in Article 282 evinces the clear intent to withdraw that special type of commission from the general classification of Article 121." [305 U. S. 83, 83 L. ed. 55, 59 S. Ct. 45.]

Had the Court been considering *selling* commissions, it would have been compelled by its own argument to give effect to the special treatment accorded such commissions by the same article of the regulations and to have held them deductible where they were found to be an ordinary and necessary expense of doing business, as the Board found in this case.

3. **General provision of Article 23 (a)-1, Regulation 86, allowing selling commissions applies, since both securities and commodities involved.**

It has already been noted that Article 24-2, Regulations 86 (similar to Article 282, Regulations 77) and G. C. M. 15,430 apply only to *securities*. It has also been noted that the selling commissions found by the Board to be deductible as business expense included both commissions on sales of *securities* and commissions on the sales of *commodities*. (R. p. 21.) The Board's findings make no segregation as between commissions paid on the respective categories, and the Commissioner has not brought up a record from which such segregation can be made. It is obvious there-

fore that the Board's decision must be sustained if commissions on the sales of either securities or commodities are deductible as a business expense.

As the special, limiting provisions of Article 24-2 apply only to sales of *securities,* the general classification of Article 23 (a)-1 of Regulations 86 (similar to Article 121 of Regulations 77) applies and commissions on the sales of commodities must be allowed as a business expense and the Board affirmed as to that point for the absence of a record showing error.

4. Covington case before Fifth Circuit. Oritz and Prentice cases before Third Circuit.

Three decisions of the Board of Tax Appeals holding selling commissions deductible, decided since the present case, are pending before the Circuit Courts of Appeal in other circuits on the Commissioner's petitions for review. The *Oritz* and *Prentice Appeals, supra,* are pending in the Third Circuit, the *Covington Appeal, supra,* is pending before the Fifth Circuit. The *Covington* case was argued on May 19, 1941, and should be decided shortly. In the interest of uniformity of decision and for the benefit of the reasoning of the Courts in these cases, it is respectfully requested that the present decision be not allowed to become final before these three appeals are disposed of.

CONCLUSION.

In conclusion it is submitted that without the factual background supplied only by G. C. M. 15,430 and without embodying it with an authority it does not possess, there is no warrant in the record for reversing the Board of Tax Appeals determination that selling commissions were an ordinary and necessary expense of taxpayer's business. Further, in view of the specific elimination of such selling commissions from the special rule found in the regulations to the effect that security commissions are not items of expense, the decisions of the Supreme Court in the *Union Pacific* and *Winmill* cases furnish authority for upholding the Board's determination rather than justifying a reversal. Finally, since the restrictions on the deduction of selling commissions apply only to "securities" and not to "commodities", the Board, in the absence of any showing in the record as to the respective amounts of commissions paid on the several classifications, must be upheld in its determination that such commissions are deductible.

A rehearing should be ordered and the Board affirmed in number 9687, and reversed in number 9682 upon the points urged by taxpayer in his briefs in the latter.

Dated, San Francisco,
June 13, 1941.

Respectfully submitted,
WALTER SLACK,
Attorney for Respondent.

CERTIFICATE OF COUNSEL.

The undersigned, attorney for respondent, hereby certifies that he prepared the foregoing petition for a rehearing and that in his judgment it is well founded and that it is not interposed for delay.

Dated, San Francisco,
June 13, 1941.

WALTER SLACK,
Attorney for Respondent.

(Appendix Follows.)

Appendix.

Appendix

COPY OF MOTION FOR MODIFICATION OF MANDATE IN WINMILL v. COMMISSIONER.

(Reproduced from the 1939 Income Tax Service of the Alexander Publishing Co. Inc., Para. 2114.)

Now comes R. C. Winmill, petitioner, in the above entitled proceeding by his attorney, Thomas M. Wilkins, Union Trust Building, Washington, D. C., and moves that the mandate of this honorable court, date of December 9, 1938, affirming the decision of the United States Board of Tax Appeals rendered in this proceeding on May 3, 1937, be recalled and amended so as to modify the former opinion and mandate of this court to affirm the decision of the Board of Tax Appeals in all respects, except with respect to the disallowance of selling commissions and to direct the Board to allow as deduction from income for the year 1932, the said selling commissions in the amount of $9,754.

The Government's petition for certiorari only sought review with respect to the deductibility of purchase commissions and did not seek review with respect to selling commissions.

The decision of the Supreme Court of the United States did not reverse the decision of this honorable court, with respect to selling commissions and hence it is apparent that the mandate of this honorable court should affirm the said Board, in all respects, except with respect to the disallowance of selling commissions in the amount of $9,754.

Wherefore, it is prayed that this honorable court consider this motion and recall and amend its mandate of December 9, 1938, to reverse the decision of the Board of Tax Appeals with respect to the said selling commissions in the amount of $9,754.

No objection

J. W. Morris, Assistant Attorney General

Mandate Amended February 6, 1939

T. M. Wilkins,
Attorney for Petitioner.

So Ordered
Manton.

NO. 9685

United States

Circuit Court of Appeals

For the Ninth Circuit.

WILLIAM A. CARMICHAEL, District Director of the United States Immigration and Naturalization Service, Los Angeles, California, District No. 20,

Appellant,

vs.

WONG CHOON OCK,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO 60-12-12-40

NO. 9685

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PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO 60-12-18-40

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

RUSSELL K. LAMBEAU, Esq.,
Assistant United States Attorney,
WILLIAM FLEET PALMER, Esq.,
United States Attorney,
Federal Building,
Los Angeles, California.

For Appellee:

GEORGE W. FENIMORE, Esq.,
Title Guarantee Building,
411 West Fifth Street,
Los Angeles, California. [1*]

In the District Court of the United States in and for the Southern District of California, Central Division.

No. 14303-C

In the Matter of the
Application of WONG CHOON OCK
for Writ of Habeas Corpus

PETITION FOR WRIT OF HABEAS CORPUS

To the United States District Court of the Southern District of California, Central Division:

The petition of Wong Quong respectfully shows:

That your petitioner herein is an American citi-

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*Page numbering appearing at foot of page of original certified Transcript of Record.

zen, his citizenship having been conceded by the Immigration Department.

1. No previous application for Writ of Habeas Corpus has been made in this matter to this or any other court.

2. This petition is made by petitioner on behalf of Wong Choon Ock for the reason that Wong Choon Ock is a minor child, nine years of age, now being held in custody and restrained of his liberty by William A. Carmichael, District Director of the United States Immigration Service at Los Angeles, California, and that petitioner knows the facts herein set forth and verifies the same on behalf of said Wong Choon Ock, who is his younger brother.

3. Notice of the presentation of this petition to the Judge of this Court has not been served upon the person who has the custody of said Wong Choon Ock for the reason that there is not sufficient time to do so. The said Wong Choon Ock is now held under order of deportation from the Secretary of Labor at Washington, D. C., directed to said William A. Carmichael, District Director of the United States Immigration Service, and as petitioner informed and believes, intends to cause said Wong Choon Ock to be removed and deported from this country to the Republic of China [2] on a boat leaving San Pedro, California on or about Wednesday, March 20, 1940.

That said Wong Choon Ock is imprisoned, detained, confined and restrained of his liberty by William A. Carmichael, District Director of the

United States Immigration Service; that said imprisonment, detention and confinement are illegal and that the illegality thereof consists of this: That said Wong Choon Ock is a citizen of the United States; that said Wong Choon Ock was born on or about November 20, 1930, in Ing Kai Village, Hoi Ping District, China; that he is the son of Wong Quan, whose United States citizenship is conceded by the Immigration Department; that Wong Quan returned to China from the United States during July, 1929 and was accompanied by his wife, Chin King Nue, who is the mother of Wong Choon Ock. It is conceded by the Immigration Department that Chin King Nue is the wife of Wong Quan.

Wong Choon Ock applied for admission to the United States at San Pedro, California on or about June 25, 1939, but was denied admission by the Immigration Department at that time despite the fact that competent witnesses testified to the fact of his birth and relationship to his father and mother as herein above alleged, and despite the fact that there was no showing at that time of any untruth in his testimony respecting his relationship and nativity and other matters bearing directly on his claim of American citizenship. It was, however, ruled by the Board of Special Inquiry of the Immigration Department based solely upon the opinion evidence of certain doctors that the appearance and bone structure of Wong Choon Ock indicating that he was from one to three years older than he and his

parents testified and that accordingly he could not be the natural son of the said parents. The said opinion evidence of these doctors upon which the decision of the Immigration Department was based was and is uncertain and indefinite and wholly insufficient to raise any conflict or to cause discrepancy in the [3] testimony as against the positive and direct testimony of eye witnesses to the nativity of Wong Choon Ock.

That during November, 1939 the said case was reopened for further evidence as to the age of Wong Choon Ock. That on November 17, 1939 and prior to the said further hearing, request was made to the Immigration Inspector in charge of said hearing that Wong Quong, Wong Jeow and Wong Jowe each of whom is a native born citizen of the United States and each of whom is an older brother of Wong Choon Ock and each of whom was personally present when Wong Choon Ock was born be permitted to testify at said hearing. That the Immigration Department denied said request and refused to allow said eye witnesses to testify regarding the nativity of Wong Choon Ock.

That the aforesaid actions on the part of the Immigration Department prevented applicant from receiving a fair and impartial hearing of his application for admission to the United States.

That an appeal was taken from the ruling of the Special Board of Inquiry excluding applicant, and the Secretary of the Department of Labor has sus-

tained the decision of said Board of Special Inquiry and ordered the deportation of applicant.

Wherefore your petitioner prays that a Writ of Habeas Corpus may be directed to William A. Carmichael, District Director of the United States Immigration Service, or any officer or officers purporting to act under his authority, commanding him to have the body of Wong Choon Ock before this Court at a time and place therein to be specified, to do and receive what shall then and there be considered by said Court concerning said Wong Choon Ock together with the time and cause of his deportation; and that said Wong Choon Ock may be restored to his liberty.

Dated: March 19, 1940.

GEO. W. FENIMORE
Attorney for Petitioner [4]

State of California
County of Los Angeles—ss.

Wong Quong being by me first duly sworn, deposes and says: that he is the petitioner in the above entitled action; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information and belief, and as to those matters he believes it to be true.

WONG QUONG

Subscribed and sworn to before me this 19th day of March, 1940.

(Seal) RICHARD H. TAYLOR

Notary Public in and for said County and State.

[Endorsed]: Filed Mar. 19, 1940. [5]

[Title of District Court and Cause.]

WRIT OF HABEAS CORPUS

The United States of America to William A. Carmichael, District Director of the United States Immigration Service, on any officer or officers purporting to act under his authority, greeting:

We command that you have the body of Wong Choon Ock by you imprisoned and detained as it is said together with the time and cause of such imprisonment and detention, by whatsoever name said Wong Choon Ock shall be called or charged, before the Honorable Geo. Cosgrave, Judge of the United States District Court in and for the Southern District of California, Central Division, at his Court room in the Federal Building, Los Angeles, California, on the 8th day of April, 1940, at 10 A. M. o'clock of that date, to do and receive what shall then and there be considered concerning said Wong Choon Ock; and that you have then and there this writ.

Witness the Honorable Geo. Cosgrave, Judge of the United States District Court this 19th day of March, 1940.

Attest my hand and seal of said Court the day and year last above written.

R. S. ZIMMERMAN
Clerk of the United States District Court, Southern District of California
By GEO. E. RUPERICH
Deputy

Let the Writ issue Returnable Apr. 8, 1940 at 10 A. M.

GEO. COSGRAVE
District Judge

[Endorsed]: Filed and served Mar. 19, 1940. [6]

[Title of District Court and Cause.]

RETURN TO WRIT OF HABEAS CORPUS

I, William A. Carmichael, District Director of U. S. Immigration and Naturalization Service, Los Angeles, California District No. 20, Respondent herein, for my Return to Writ of Habeas Corpus issued herein and in compliance with the said Writ of Habeas Corpus, now produce the body of Wong Choon Ock on this 8th day of April, 1940 before this Honorable Court and for my Return to said Writ deny that I am unlawfully imprisoning and detaining and confining and restraining the liberty of the aforesaid Wong Choon Ock.

For further Return to said Writ, Respondent admits that the said Wong Choon Ock arrived from China at the Port of San Pedro, California the 25th day of June, 1939 on the SS "President Coolidge"

and made application for admission into the United States, and certifies that the true cause of said Wong Choon Ock's detention is the finding and order of a duly and regularly constituted Board of Special Inquiry denying him admission into the United States made November 28, 1939, and the order of the Department of Labor, Washington, D. C., made on or about March 15, 1940 confirming the decision of the said Board of Special Inquiry and ordering the return of said Wong Choon Ock to the country whence he came; that Respondent was preparing to return the said Wong Choon Ock to the country whence he came when this Writ of Habeas Corpus was issued.

For further Return, Respondent makes a part hereof the Department of Labor certified record containing transcript of the testimony and summary and findings of the Board of Special Inquiry, San Pedro, California, and summary and findings of the Board of Review, Washington, D. C., and also certain U. S. Immigration and Naturalization Service records, identi- [7] fied by files numbers 10351/5290, 10351/5311, 12851/11-13, 13794/9-2, 21285/1-2, and 31562/7-17 (San Francisco, California), and 7402/379, 14036/232-A, 14036/333-B, 14036/968-A, 14036/1103-A, 14036/1425-A and 14036/1702-A (San Pedro, California.)

Respectfully submitted,

WILLIAM A. CARMICHAEL

District Director of U. S. Immigration and Naturalization Service, Los Angeles, California, District No. 20, Respondent.

[Endorsed]: Filed Apr. 8, 1940 Received copy of the within Return to Writ of Habeas Corpus this 8th day April, 1940, Geo. W. Fenimore, Attorney for Petitioner. [8]

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

Cosgrave, District Judge.

In this matter the Board of Review on Appeal of the Immigration Department in Washington, being dissatisfied with the sufficiency of the evidence supporting the findings of the Special Board of Inquiry, sent the case back with instructions to take further expert testimony. Pursuant to such order Dr. Earl C. Kading was called. No notice whatever was given to the applicant of the production of Dr. Kading as a witness and no opportunity afforded for cross-examination of this expert on behalf of the applicant, nor was applicant given any opportunity to produce witnesses to controvert the testimony of Dr. Kading.

Such proceeding is manifestly unfair, particularly since in reaching its decision the Immigration Department has disregarded the competent and uncontradicted testimony of eye-witnesses as to the date of nativity and parentage of applicant.

The petition for writ of habeas corpus is granted,

and the petitioner is discharged from the custody of the Immigration authorities.

July 1, 1940.

[Endorsed]: Filed Jul. 1, 1940. [9]

In the District Court of the United States in and for the Southern Division of California, Central Division

No. 14,303-C

In the Matter of

WONG CHOON OCK

on Habeas Corpus

ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS AND DISCHARGING APPLICANT FROM CUSTODY

This cause having come on regularly for hearing in the above entitled court before the Hon. Geo. Cosgrave, Judge presiding, upon the Petition of Wong Quong for a Writ of Habeas Corpus on behalf of Wong Choon Ock and upon the return to said Writ of Habeas Corpus made by William A. Carmichael, District Director of the United States Immigration and Naturalization Service, Los Angeles, California, District No. 20, respondent herein, Geo. W. Fenimore, Esq. appearing on behalf of the petitioner and Maurice Norcop, Assistant U. S. Attorney appearing on behalf of said respondent, and said matter having been submitted to the court

for decision, and the court having found that the allegations of the said petition are true and that the said Wong Choon Ock is illegally restrained of his liberty and prevented from entry into the United States by the respondent herein.

Now, therefore, it is ordered, adjudged and decreed that said petition for Writ of Habeas Corpus be and the same is hereby granted and the applicant, Wong Choon Ock, who applied for admission into the United States at San Pedro, California, on June 25, 1939, as an American citizen, being the son of a native born American citizen, Wong Quan, is ordered, discharged and released from custody forthwith.

Done in open court this 2nd day of July, 1940.

GEO COSGRAVE
District Judge

[Endorsed]: Filed Jul. 2, 1940. [11]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To R. S. Zimmerman, Clerk of the above entitled court, and George W. Fenimore, Attorney for Wong Choon Ock:

Please take notice that William A. Carmichael, District Director of Immigration and Naturalization for Los Angeles District No. 20, Department of Justice, Respondent in the above entitled matter, hereby appeals and gives notice of appeal to

the United States Circuit Court of Appeals for the Ninth Circuit, from the decision and judgment of the above entitled Court, made and entered herein on the second day of July, 1940, discharging and releasing from custody of the immigration authorities, the petitioner, Wong Choon Ock.

Dated: July 3, 1940.

WM. FLEET PALMER
United States Attorney
By RUSSELL K. LAMBEAU
Assistant United States
Attorney

[Endorsed]: Copy mailed July 6, 1940 to George W. Fenimore, Esq., Atty. for petitioner. R. S. Zimmerman, Clerk, By E. L. S. Deputy Clerk. Filed Jul. 3, 1940. [12]

[Title of District Court and Cause.]

STIPULATION AND ORDER EXTENDING TIME

It is hereby stipulated by and between counsel for the applicant and for the United States in the above entitled matter that the appellant may have ninety (90) days from the date of the first notice of appeal within which to file the record on appeal, as provided by Rule 73(g) of the Rules of Civil Procedure; It is further stipulated that this extension may be granted by any Judge of the United States District Court for the Southern District of California.

George W. Fenimore
Attorney for Appellee
WM. FLEET PALMER
United States Attorney
By RALPH E. LAZARUS
RALPH E. LAZARUS
Assistant United States
Attorney
Attorneys for the United States

Good cause appearing,

It is hereby ordered that the time to file the record on appeal in the above entitled matter by extended to ninety (90) days from the date of the first notice of appeal.

Aug. 12, 1940

PAUL J. McCORMICK
United States District Judge.

[Endorsed]: Filed Aug. 12, 1940. [13]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated that all of the original files of the Immigration and Naturalization Service shall be transmitted to the Circuit Court of Appeals, Ninth Circuit, in connection with the appeal herein, and that said files shall constitute a part of the record on appeal and will not however be printed.

It is further stipulated that included in said records shall be the following files of the Immigration and Naturalization Service: numbers 10351/5290, 10351/5311, 12851/11-13, 13794/9-2, 21285/1-2, and 31562/7-17 (San Francisco, California), and 7402/379, 14036/232-A, 14036/333-B, 14036/968-A, 14036/1103-A, 14036/1425-A and 14036/1702-A (San Pedro, California) together with certified record of the Department of Labor, numbered 56007/819.

It is further stipulated that all exhibits contained in said files shall also constitute a part of the record and shall be forwarded therewith.

Dated: This 4th day of Nov., 1940.

WM. FLEET PALMER
United States Attorney
RUSSELL K. LAMBEAU
Assistant United States Attorney
Attorneys for Plaintiff
GEO. W. FENIMORE
Attorney for Defendant

It is so ordered:

PAUL J. McCORMICK
United States District Judge.

[Endorsed]: Filed Nov. 4, 1940. [14]

[Title of District Court and Cause.]

STATEMENT OF POINTS RELIED ON

Comes now William A. Carmichael, District Director of the United States Immigration and Natu-

ralization Service, Appellant in the above-entitled matter and respectfully presents the following statement of points relied on in the decision of the District Court for the Southern District of California:

1. The Court erred in discharging said Wong Choon Ock from custody of Appellant.

2. The Court erred in finding and holding that the proceeding resulting in Appellee's exclusion was unfair.

3. The Court erred in finding and holding that no notice was given to Appellee of the production of Dr. Kading as a witness.

4. The Court erred in finding and holding that Appellee was not given an opportunity to produce witnesses to controvert the testimony of said Dr. Kading.

5. The Court erred in finding and deciding that the Immigration Department disregarded the competent and uncontradicted testimony of eye witnesses as to the date and nativity and parentage of Appellee.

Dated this 30th day of September, 1940.

WM. FLEET PALMER,
United States Attorney,
By RUSSELL K. LAMBEAU
Assistant United States
Attorney.

[Endorsed]: Received copy of the within Points Relied on, Statement of, this 2nd day of Oct. 1940, Geo. W. Fenimore, Attorney for Appellee. Filed Oct. 2, 1940. [15]

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL

To the Clerk of Said Court:

Please prepare and duly authenticate the transcript of the following portions of the record in the above-entitled case for appeal to the United States Circuit Court of Appeals for the Ninth Circuit:

1. Petition for Writ of Habeas Corpus and Order to Show Cause why Writ should not be granted.
2. Writ of Habeas Corpus.
3. Return to Writ of Habeas Corpus.
4. Memorandum of Decision.
5. Notice of Appeal.
6. Stipulation and Order extending time within which to file record on appeal.
7. Stipulation that original files and records of the Department of Labor be sent to Clerk of Circuit Court of Appeals as part of the appeal record.
8. Points relied on, statement of.
9. Praecipe for transcript of record on appeal.

September 30, 1940.

WM. FLEET PALMER,
United States Attorney,
By RUSSELL K. LAMBEAU,
Assistant United States
Attorney.

[Endorsed]: Received copy of the within Praecipe for Transcript of Record on Appeal this 2nd

day of October, 1940, Geo. W. Fenimore, Attorney for Appellee. Filed Oct. 2, 1940. [16]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing pages, numbered from 1 to 16, inclusive, contain full, true and correct copies of Petition for Writ of Habeas Corpus; Order Granting Writ of Habeas Corpus; Writ of Habeas Corpus; Return to Writ of Habeas Corpus; Memorandum of Decision; Minute Order July 1, 1940; Order Granting Petition and Discharging Petitioner; Notice of Appeal; Stipulation and Order Extending Time to Docket Appeal; Stipulation re original files and records of the Department of Labor; Statement of Points to be relied on, and Designation for Transcript of Record on Appeal, which together with the original Immigration records sent herewith constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the Seal of the District Court of the United States for the Southern District of California, this 19th day of November, A. D. 1940.

(Seal) R. S. ZIMMERMAN,
Clerk.
By EDMUND L. SMITH
Deputy Clerk.

[Endorsed]: No. 9685. United States Circuit Court of Appeals for the Ninth Circuit. William A. Carmichael, District Director of the United States Immigration and Naturalization Service, Los Angeles, California, District No. 20., Appellant, vs. Wong Choon Ock, Appellee. Transcript of Record upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed November 20, 1940.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit

9685

UNITED STATES OF AMERICA,

Appellant,

v.

WONG CHOON OCK,

Appellee.

DESIGNATION OF RECORD AND STATEMENT OF POINTS RELIED ON

The United States of America, appellant herein, hereby refers to its points relied on as filed in the District Court and incorporates the same herein by reference as though herein set forth in full as the points upon which it relies on this Appeal.

The following portions of the record are hereby designated by Appellant for its record on appeal:

1. Petition for Writ of Habeas Corpus and Order granting Writ.
2. Writ of Habeas Corpus.
3. Return to Writ of Habeas Corpus.
4. Memorandum of Decision.
5. Order of July 2, 1940, signed by Judge Cosgrave.
6. Notice of Appeal.
7. All stipulations and orders extending time within which to file and perfect record on appeal.
8. Stipulation that original files and records of the Department of Labor be sent to Clerk of Circuit Court of Appeals as part of the appeal record.
9. Points relied on, statement of.
10. Praecipe for transcript of record on appeal.

Dated: November 19, 1940.

WM. FLEET PALMER
United States Attorney
By RUSSELL K. LAMBEAU
Assistant United States
Attorney

Received copy of the within Designation of Record and Statement of Points Relied On, this 19th day of November, 1940.

GEO. W. FENIMORE
Attorney for Appellee

[Endorsed]: Filed Nov. 20, 1940. Paul P. O'Brien, Clerk.

No. 9685

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM A. CARMICHAEL, District Director of the United States Immigration and Naturalization Service, Los Angeles, California, District No. 20,

Appellant,

vs.

WONG CHOON OCK,

Appellee.

APPELLANT'S OPENING BRIEF.

WM. FLEET PALMER,
United States Attorney,

By RUSSELL K. LAMBEAU,
Assistant United States Attorney,

United States Postoffice and Courthouse Building, Los Angeles, California,

Attorneys for Appellant.

Parker & Baird Company, Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

No. 9685

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM A. CARMICHAEL, District Director of the United States Immigration and Naturalization Service, Los Angeles, California, District No. 20,

Appellant,

vs.

WONG CHOON OCK,

Appellee.

APPELLANT'S OPENING BRIEF.

Opening Statement.

This is an appeal from an order discharging Wong Choon Ock from the custody of the United States Immigration and Naturalization Service [R. 9-11]. The appellee Wong Choon Ock, having been denied admission into the United States, petitioned the lower court for a writ of habeus corpus to test the legality of his detention by appellant. The jurisdiction of the court below to entertain and consider such a writ is found in provisions of 28 U. S. C., section 45 (R. S., sec. 751). The juris-

diction of this Court on the appeal is based on the provisions of 28 U. S. C. 225-A (Jud. Code 128 as amended).

By stipulation and order [R. 13] certain original files of the United States Immigration and Naturalization Service which comprise the entire record upon which the excluding order was made have been filed with the clerk of this court as part of the appellate record. The certified file of the Department of Labor, No. 56007/819, will be hereinafter called the "Immigration Record." It contains the original transcript of the hearing at San Pedro, California, the various exhibits introduced, the summary, and the recommendation of the Board of Review in Washington, D. C., and the action of the Secretary of Labor on appeal.

Facts of the Case.

Wong Choon Ock, hereinafter called "applicant," admittedly was born in China and is a person of the Chinese race. He came to the port of San Pedro, California, from China, June 25, 1939, accompanied by his alleged mother, Chin King Nue (Chin Shee), an alleged younger brother, Wong Choon Loy, and his alleged father, Wong Quan; and applied for admission to the United States, claiming to be the foreign-born son of Wong Quan, a native-born citizen of the United States. The United States citizenship of the said Wong Quan is conceded and is therefore not at issue.

The admissibility of the applicant, his alleged younger brother, Wong Choon Loy and his alleged mother, Chin King Nue, was considered by a Board of Special Inquiry duly appointed under section 17 of the Immigration Act of 1917 (8 U. S. C. A., 153). After a hearing the Board voted to admit to the United States the said alleged mother and younger brother, but denied admission to the applicant, Wong Choon Ock, for the reason that it had not been established to the satisfaction of said Board that he was the son of Wong Quan. An appeal from the excluding decision was taken to the Secretary of Labor. On the appeal the applicant was represented by a lawyer residing in Washington, D. C. The decision of the San Pedro Board was affirmed. The Secretary directed that the applicant be returned to China at the expense of the steamship company which brought him here. Appellant was about to return the applicant to China when a writ of habeas corpus was issued. After a hearing on the matter, the District Court entered an order discharging the alien from custody of the appellant [R. 10]. From that order this appeal is taken.

Question at Issue.

In his memorandum decision of July 1, 1940 [R. 9], the District Court said:

> "No notice whatever was given to the applicant of the production of Dr. Kading as a witness and no opportunity afforded for cross-examination of this expert on behalf of the applicant, nor was applicant given any opportunity to produce witnesses to contravert the testimony of Dr. Kading.
>
> "Such proceeding is manifestly unfair, particularly since in reaching its decision the Immigration Department has disregarded the competent and uncontradicted testimony of eye-witnesses as to the date of nativity and parentage of applicant."

It appears from the District Court's opinion, granting the petition for a writ of habeas corpus and discharging Wong Choon Ock from the custody of the Immigration authorities that, succinctly stated, the court regarded the hearing in this case to be unfair solely because the applicant was not permitted to be represented by counsel before the Board of Special Inquiry. Therefore, while there are five assignments of error relied upon by appellant [R. 14], there is but one issue before this Honorable Court:

WAS THE APPLICANT ACCORDED A FAIR HEARING?

Or specifically:

DID DENIAL OF REPRESENTATION BY COUNSEL AT THE IMMIGRATION HEARING RENDER THE HEARING UNFAIR?

Argument.

The immigration authorities decided the citizenship status of the applicant. This was primarily a question of fact and was decided adversely to the applicant by a regularly constituted administrative board authorized by law to consider and decide such a question of fact. It is well established that if the immigration authorities considered the applicant's claim for admission at a fair hearing and gave him a reasonable opportunity to establish his citizenship and, in so doing, did not abuse the discretion lodged with them, their finding of fact upon the question of citizenship is conclusive:

Quon Quon Poy v. Johnson (1927), 273 U. S. 352;

Weedin v. Yee Wing Soon (C. C. A. 9, 1931), 48 Fed. (2d) 36.

Appellant submits that the hearing resulting in the applicant's exclusion was fair and that it conformed to the requirements of "due process." The applicant was born in China and is of the Chinese race. He arrived in the United States for the first time without documentary proof of his claimed United States citizenship. The matter rested upon a question of fact, *i. e.*, whether applicant was the foreign-born son of Wong Quan, who concededly is a United States citizen. On this question the burden of proof was upon the applicant:

Mui Sam Hun v. United States (C. C. A. 9, 1935), 78 Fed. (2d) 612, 613:

United States v. Day (C. C. A. 3, 1932), 54 Fed. (2d) 990, 991;

Lum Sha You v. United States (C. C. A. 9, 1936), 82 Fed. (2d) 83, 84;

Woon Sun Seung v. Proctor (C. C. A. 9, 1938), 99 Fed. (2d) 285;

Jung Yen Loy v. Cahill (C. C. A. 9, 1936), 81 Fed. (2d) 809.

At the time of his arrival at San Pedro on June 25, 1939, the applicant claimed to be approximately 8 years and 7 months old. He appeared to the Board members to be much older [see p. 16, Q. 151, Immigration Record]. This opinion of these Board members based upon his physical appearance, should not be considered remarkable after examining the photographs of applicant and his alleged brother, Wong Choon Loy, which were introduced in evidence at the Board hearing, marked Exhibits "E" and "F." Wong Choon Loy, applicant's alleged brother, is seven years and three months old and applicant claims to be 8 years, 7 months old, a difference of one year and four months. Nevertheless, the photographs show the applicant to be practically twice as tall as his alleged brother. In view of this discrepancy the Board called in medical officers of the United States Public Health Service for a medical opinion as to his age. Dr. Harold M. Graning, assistant surgeon, made an exhaustive physical examination of the applicant and Dr. Albert Allen, roentgenologicalist, took several x-ray photographs of him. Dr. Graning submitted a detailed report and analysis of his examination, which report included the findings of Dr. Allen. Dr. Graning's conclusion was that the applicant's true age ranged between 11 and 13 years. Basing his opinion on x-rays of the bony structure, Dr. Allen reported that the applicant was 13 years of age.

On July 31, 1931, at the request of applicant's representative, the hearing before the Board of Special In-

quiry was reopened by order of the Los Angeles District Director to permit the introduction of the testimony of a physician, Dr. F. McLean Campbell, privately employed by the applicant. It is interesting to note the following testimony *given by the applicant's medical witness* [Immigration Record, p. 32]:

> "263. Q. After giving him [applicant] the examination you thought necessary, what conclusion did you arrive at?
>
> A. *That he was at least the age of ten years.*" (Emphasis ours.)

If this is taken as the correct age it would place the applicant's birth at about July of 1929. But we have the alleged father's testimony that the date he and his wife left the United States was July 17, 1929. Consequently, they would not arrive in China until some time in August. This same witness, testifying in behalf of the applicant, also gave the following testimony [Immigration Record, p. 32]:

> "270. Q. Doctor, the applicant, Wong Choon Ock, claims birth on November 20, 1930, which would make him 8 years and 7 months on June 20, 1939, do you think it at all likely that he could be that age?
>
> A. *No, that is rediculous on account of the permanent teeth which he has now and the epiphyseal marks in the x-rays as shown.*" (Emphasis ours.)

Dr. Campbell's letter to Mr. Richard H. Taylor, local representative of applicant, is a part of the Board record, marked Exhibit "G." It will be noted he wrote to Mr. Taylor in part as follows:

> "* * * I'm very sorry but the boy is at least 10 years old * * *."

Thus, the Board's opinion of the boy's age based on the opinion of the Board members as to his external physical appearance in size, is supported by the evidence of Drs. Graning and Allen that he was from 11 to 13 years of age and that of the applicant's witness, Dr. Campbell, that he was "*at least* ten years old." The applicant appealed to the Secretary of Labor from the Board's decision and the record was forwarded to Washington where the Board of Review recommended that the case be reopened "in order to afford opportunity for the consideration of such further evidence as may be presented by the United States Public Health Service as to the applicant's age."

The recommendation of the Board of Review was followed and on November 22, 1939, the hearing was again reopened and testimony of Dr. Earl C. Kading was heard by the Board of Special Inquiry at San Pedro, California. Dr. Kading, a physician of 20 years' experience, testified he had examined Chinese aliens since May of 1927 at the immigration hospital at Angel Island, California, and during that time the number of Chinese examined would run into the thousands; that he had examined at least 500 Chinese for the purpose of estimating their age. Dr. Kading's report was made a part of the record and marked Exhibit "I" [Immigration Record]. He was of the opinion the applicant was between 13 and 15 years of age. The Board again decided that the applicant was not the son of Wong Quan and therefore not a citizen of the United States, and voted unanimously to deny him admission to this country. From this decision applicant again appealed but his appeal was dismissed by the Secretary. Both locally and at Washington, the applicant was represented by counsel and briefs were filed in his behalf on both appeals.

So we have the opinion of four physicians that the applicant is older than eight years and seven months, which he claimed was his correct age on June 25, 1939. The lowest estimate of his correct age is given by his own witness, Dr. Campbell, *that he is at least 10 years of age.* It should be borne in mind that Dr. Campbell's testimony to this effect was given July 31, 1939, and if the applicant's tenth birthday occurred on that date he could not very well be the child of his alleged parents as they did not arrive in China until the middle of August, 1929.

The age discrepancy has been definitely established. The issue is one of fact and hence one for the determination of the immigration authorities. There is no better established rule than that where the issue rests upon a question of fact the administrative decision is not subject to attack, unless it affirmatively appears that it could not have been reasonably reached by a fair-minded man. See:

Weedin v. Chin Share Jung (C. C. A. 9, 1933), 62 Fed. (2d) 569, 570;

Tisi v. Tod, 264 U. S. 131;

Vajtauer v. Commissioner (1924), 273 U. S. 103, 106;

Jun Yen Loy v. Cahill (C. C. A. 9, 1936), 81 Fed. (2d) 809;

Chin Chung v. Nagle (C. C. A. 9, 1931), 51 Fed. (2d) 64;

Haff v. Der Yam Min (C. C. A. 9, 1934), 68 Fed. (2d) 626.

The recent case of:

Hom Ark v. United States (C. C. A. 9), 105 Fed.

(2d) 607, decided July 11, 1939, determines and controls all the issues involved in the case at bar. That case, likewise, involved a foreign-born Chinese applying for admission as a citizen. The age of the applicant was at issue. He claimed to have been born February 22, 1921, thus making him 17 years, 2 months and 20 days old when examined for admission. In this he was supported by the oral testimony of his alleged father. The medical officers of the United States Public Health issued a certificate stating that the applicant was at least twenty years of age. They based their opinion on x-rays of the humerous showing the union of the lateral and medial epicondyles; the union of the trochlea and capitellum, and the fusion of the upper and lower epiphyses with the body. The applicant was then examined by his own privately employed physician who testified from his examination that the applicant was no more than 17 years of age. There was therefore a sharp conflict of medical opinion. No further evidence was taken and the Board of Special Inquiry concluded the applicant was born prior to February 8, 1921, and that, therefore, he was not a citizen of the United States. Our District and Circuit Courts both sustained the findings of the immigration authorities. In writing the unanimous opinion for the Circuit Court of Appeals, Ninth Circuit, in the *Hom Ark* case, Judge Matthews says in part:

> "X-ray pictures are not, of course, an infallible means of determining age. No one claims that they are. Nevertheless, to a medical expert, such pictures may be a valuable aid in arriving at an opinion of that subject. Such was the use which Drs. Smith and Evans (U. S. Public Health Service Surgeons) made of the pictures taken by Dr. Allen.

"The qualifications of Drs. Smith and Evans were not challenged, nor was their testimony objected to. *Their testimony was, to be sure, opinion testimony, but is not incompetent or otherwise improper. What weight it should be given was for the board to determine. We cannot review that determination nor substitute our judgment for that of the board.* Wong Fook Ngoey v. Nagle (9 CCA) 300 F. 323; Fong Lim v. Nagle, 9 Cir., 2 F. (2d) 971; Young Fat v. Nagle, 9 Cir. 3 F. (2d) 439; Tom Him v. Nagle, 9 Cir., 27 F. (2d) 885; Low Git Cheung v. Nagle, 9 Cir., 36 F. (2d) 452." (Emphasis ours.)

No two cases could be more similar on the facts or to the law. In our opinion, it determines all the issues presented here. It is clear that when the age of a person becomes an issue and the person is present before the triers of the fact, it can hardly be doubted that they are at liberty to use their senses and to draw conclusions as to the person's age from his physical appearance (*Wigmore Evid.* (2d Ed.) 222; *Wong Fook Ngoey v. Nagle* (C. C. A. 9), 300 Fed. 323). It is true that such inference cannot always be drawn with accuracy, but when such inference is supported by the testimony of expert medical witnesses, it cannot be said, as a matter of law, that the record does not present some evidence in contradiction of the testimony of the applicant and his witnesses. Our Circuit Court has repeatedly accepted proof by physicians certificate in similar cases:

Wong Fook Ngoey v. Nagle, supra;

Fong Lim v. Nagle (C. C. A. 9, 1925), 2 Fed. (2d) 971;

Young Fat v. Nagle (C. C. A. 9, 1925), 3 Fed. (2d) 439;

Tom Hing v. Nagle (C. C. A. 9, 1928), 27 Fed. (2d) 885;

Low Git Cheung v. Nagle (C. C. A. 9, 1929), 36 Fed. (2d) 452.

In none of the above cited cases was the applicant represented by counsel before the Board of Special Inquiry. This was in accord with Rule 12 of the Immigration and Naturalization Service, which prohibits the presence of participation of counsel in exclusion hearings before a Board of Special Inquiry. We submit that to nullify this rule would have a most detrimental effect on enforcement of the immigration laws. It would seriously hamper administration of such laws by permitting thousands of immigrants to demand judicial hearings on their right to enter the United States when called for a hearing before the administrative boards.

It will be observed that this case involves an exclusion proceeding and not a deportation proceeding. Not only the administrative rules of the Immigration and Naturalization Service, which were promulgated pursuant to the immigration laws, are different in exclusion cases and deportation cases, but the rules and principles of law involved also differ. The pertinent question in the case at bar is whether there is authority under the immigration laws to promulgate Rule 12 of the Immigration Rules and whether Rule 12 and Rule 19 of the Immigration Rules, when they are construed together, show an unfair discrimination against an applicant for entry into the United States in favor of an alien who is to be deported from the United States.

The following provisions of Rule 12 pertain to the question involved in the case at bar:

"Rule 12—Examination of Applicants by Boards of Special Inquiry.

* * * * * * * * *

Subdivision B.—Hearings.

"Paragraph 1.—Boards of special inquiry shall determine all cases as promptly as circumstances permit, in the estimation of the immigration official in charge, due regard being had to the necessity of giving the alien a fair hearing. Hearings before the boards 'shall be separate and apart from the public'; but the alien may have one friend or relative present after the preliminary part of the hearing has been completed; *provided*, first, that such friend or relative is not and will not be employed by him as counsel or attorney; second, that if a witness, he has already completed the giving of his testimony; third, that he is not the agent or a representative at an immigration station of an immigration aid or other similar society or organization; and, fourth, that he is either actually related to or an acquaintance of the alien.

* * * * * * * * *

Subdivision E.—Excluded Alien Informed of Rights.

"Paragraph 1.—An excluded alien shall be informed that the return voyage is at the expense of the transportation company which brought him; that such transportation company must return him in the same class in which he came. The fact that he has been so informed shall be entered in the minutes.

"Paragraph 2.—Where an alien is excluded by a board of special inquiry he shall be advised of the decision of said board and the reason therefor, and when entitled to appeal to the Secretary of Labor, he shall be so advised, provided that the exact language employed in advising alien of his right to appeal, together with a full and accurate transcript of alien's reply, shall be inserted in the record and made a part thereof."

Rule 12 of the Immigration Rules was promulgated pursuant to section 17 of the Act of February 5, 1917, which prescribes the function of boards of special inquiry in the following language:

"That boards of special inquiry shall be appointed by the commissioner of immigration and naturalization or inspector in charge at the various ports of arrival as may be necessary for the prompt determination of all cases of immigrants detained at such ports under the provisions of the law. Each board shall consist of three members, who shall be selected from such of the immigrant and naturalization officials in the service as the Commissioner of Immigration and Naturalization, with the approval of the Secretary of Labor, shall from time to time designated as qualified to serve on such boards. * * * Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported. All hearings before such boards shall be separate and apart from the public, but the immigrant may have one friend or relative present under such regulations as may be prescribed by the Secretary of Labor; such boards shall keep a complete permanent record of their proceedings, and of all such testimony as may be produced before them; and the de-

cisions of any two members of the board shall prevail, but either the alien or any dissenting member of said board may appeal through the Commissioner of Immigration and Naturalization at the port of arrival, and the Commissioner of Immigration and Naturalization to the Secretary of Labor, and the taking of such appeal shall operate to stay any action in regard to the final disposal of any alien whose case is so appealed until the receipt by the Commissioner of Immigration and Naturalization at the port of arrival of such decision which shall be rendered solely upon the evidence adduced before the board of special inquiry. In every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of a board of special inquiry adverse to the admission of such alien shall be final, unless reversed on appeal to the Secretary of Labor * * *." (39 Stat. 887; 8 U. S. Code, sec. 153.)

It should be observed that Rule 12, *supra,* is applicable to all persons seeking admission to the United States. It governs exclusion hearings and does not purport to deal with the rights of alleged aliens found in this country and who have been apprehended under warrant of arrest. Rights of persons subject to deportation proceedings are determined under the provisions of Rule 19 of the Immigration Rules, which provides:

"SUBDIVISION D.—EXECUTION OF WARRANTS OF ARREST AND HEARINGS THEREON.

* * * * * * * * *

"Paragraph 2.—At the hearing under the warrant of arrest the alien shall be allowed to inspect the warrant of arrest and shall be advised that he may be

represented by counsel. The alien shall be required then and there to state whether he desires counsel or waives the same, and his reply shall be entered on the record. If counsel be selected, he shall be permitted to be present during the conduct of the hearing and to offer evidence to meet any evidence presented or adduced by the Government. Objections of counsel shall be entered on the record, but the reasons for such objections shall be presented in accompanying briefs. If, during the hearing, it shall appear to the examining inspector that there exists a reason additional to those stated in the warrant of arrest why the alien is in the country in violation of law, the alien shall be notified that such additional charge will be placed against him and shall be given an opportunity to show cause why he should not be deported therefor."

Rule 19, *supra*, applies only to proceedings to deport a resident alien and was made within the purview of section 19 of the Act of February 5, 1917 (39 Stat. 889; 8 U. S. Code, sec. 155). It has no application whatever to the examination of persons before boards of special inquiry in exclusion proceedings.

Rule 12 and Rule 19 of the Immigration Rules and Regulations are not lacking in uniformity. They apply impartially and without exception to the respective classes of persons to which they are addressed and meet the test of uniform application of statutes.

Head Money Cases (1884), 112 U. S. 580, 594;

Florida v. Mellon, Secy. of the Treasury, et al. (1926), 273 U. S. 12, 17.

No higher test should be applied to rules promulgated under the provisions of the statute than would be applied to the statute itself. It may be granted that these rules discriminate in favor of the resident alien. The resident alien who is the subject of deportation proceedings is taken into custody on a warrant of arrest and is allowed counsel in a *quasi*-judicial hearing, whereas the immigrant who, in contemplation of law, is without the United States and seeking admission, has his rights determined in a summary proceeding without benefit of counsel before the administrative board. Rule 19, *supra,* was made pursuant to section 19 of the Act of February 5, 1917, which outlines no particular procedure to be allowed except that, after enumerating the classes which are subject to deportation, it states that they shall, on warrant of the Secretary of Labor, be taken into custody and deported. On the contrary, in section 17 of the Act of February 5, 1917 (8 U. S. C. A. 153), which concerns the proceedings to be had by boards of special inquiry where persons are without the country and applying for admission, the Congress has provided very carefully for the constitution of examining boards and their procedure. It follows that any distinction between resident aliens and persons seeking admission to the United States is made by act of the Congress. Since the Immigration Rules and Regulations are not contrary to the provisions of the statute under which they were framed, the attack is not on the rules but really is addressed to the statute.

At this point, it is well to consider the reason for the distinction made by the statute and the pertinent rules. The District Court's decision that the denial of counsel before the Board of Special Inquiry constituted an unfair hearing is tantamount to saying that Wong Choon Ock

was denied due process of law. The due process clauses of the Constitution apply to aliens resident within the country as well as resident citizens.

The Japanese Immigrant Case (1903), 189 U. S. 86;

Yick Wo v. Hopkins (1885), 118 U. S. 356, 369;

Fong Yue Ting v. United States (1893), 149 U. S. 698, 724;

Ng Fong Ho v. White (1922), 259 U. S. 278, 282-285;

United States ex rel. Bilokumsky v. Tod (1923), 263 U. S. 149, 152-155.

However, this guarantee does not extend to those persons who are not resident in the United States or within its jurisdiction, even though they are citizens of the United States.

Balsacc v. People of Porto Rico (1922), 259 U. S. 298;

Neely v. Henkel (1901), 180 U. S. 109, 122-123;

Ng Fong Ho v. White, supra.

Applicants for admission to the United States are, in contemplation of law, without a country and seeking to enter this country. The Congress has plenary power to exclude any or all aliens with or without any reason and to apply such conditions to their admission to the United States as it sees fit. The applicant for admission to this country can invoke only such rights as the Congress has seen fit by statute to confer upon him.

Nishimura Ekiu v. United States (1892), 142 U. S. 651.

Due process of law in respect to a resident alien is that which is required not only by the statute but by the Constitution, for if the statute fails to provide for such hearing as fairly may be considered to be within the meaning of due process of law as used by the Constitution, he may appeal over the statute to his constitutional rights. However, due process of law is satisfied in respect to applicants for admission into the country, who obviously are not within the country, when there has been a fair compliance with the statute alone.

Low Wah Suey v. Backus (1912), 225 U. S. 460;

United States v. Sing Tuck (1904), 194 U. S. 161;

Chin Yow v. United States (1908), 208 U. S. 8, 12;

United States v. Ju Toy (1905), 198 U. S. 253, 262-263;

United States ex rel Dong Yick Yuen v. Dunton (C. C. A. 2, 1924), 297 Fed. 447, 449.

Although the applicant for admission asserts citizenship in the United States, the primary investigation by the administrative officer is to determine whether applicant's claim is well-founded.

United States v. Sing Tuck, supra;

Quon Quon Poy v. Johnson (1927), 273 U. S. 352, 358.

The decisions uniformly hold that due process of law has been accorded to an applicant for admission to the United States where a hearing has been conducted in compliance with the statute. *Chin Yow v. United States, supra.* It is an attribute of sovereignty that a nation has the arbi-

trary right to exclude all aliens. The right to regulate the admission of aliens is a corrolary of the right to exclude absolutely. Both the power of exclusion and the power of regulation are plenary. The immigration powers are vested in the Congress, which may designate the agencies to effectuate its adopted policies. The only check on the designated agency is that it must not transcend its designated authority or abuse its discretion. As long as such designated agency operates within the limits of its authority and does not abuse its discretion, the courts may not interfere.

The Japanese Immigrant Case, supra;

United States ex rel. Barlin v. Rodgers (C. C. A. 3, 1911), 191 Fed. 970;

Choy Gum v. Backus (C. C. A. 9, 1915), 233 Fed. 487;

White v. Kwock Sue Lum (C. C. A. 9, 1923), 291 Fed. 732;

United States ex rel. Ciccerelli v. Curran (C. C. A. 2, 1926), 12 Fed. (2d) 394.

In *The Japanese Immigrant Case, supra,* Justice Harlan, speaking for the Supreme Court, said (pp. 97-99):

> "The constitutionality of the legislation in question, in its general aspect, is no longer open to discussion in this court. That Congress may exclude aliens of a particular race from the United States; prescribe the terms and conditions upon which certain classes of aliens may come to this country; establish regulations for sending out of the country such aliens as come here in violation of law; and commit the en-

forcement of such provisions, conditions, and regulations exclusively to executive officers, without judicial intervention, are principles firmly established by the decisions of this court. *Nishimura Ekiu v. United States,* 142 U. S. 651; *Fong Yue Ting v. United States,* 149 U. S. 698; *Lem Moon Sing v. United States,* 158 U. S. 358; *Wong Wing v. United States,* 163 U. S. 228; *Fok Yung Yo v. United States,* 185 U. S. 296, 305.

"* * * It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicil or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the National Government. As to such persons, the decisions of executive or administrative officers, acting within the powers expressly conferred by Congress, are due process of law. *Murray v. Hoboken Co.,* 18 How. 272; *Hilton v. Merritt,* 110 U. S. 97.

"In *Lem Moon Sing's* case it was said: 'The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come into this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications.' And, in *Fok Yung Yo's* case, the latest one in this court, it was said: 'Congressional action has placed the final determination of the right of admission in executive officers, without judicial intervention, and this has been for many years the recognized and declared policy of the country."

The Congress has seen fit to place the burden of enforcement of its immigration policy upon the executive branch of the Government. It could have clothed the judiciary with the duty of enforcing the immigration laws. However, the Congress did not see fit to confer such jurisdiction on the courts. It is the sole function of the courts, when they are appealed to, to determine whether a fair summary hearing has been accorded to an alleged alien when he is taken before an administrative board to determine his right to enter the United States. If an alien is found within the confines of this country and claims to be a citizen of the United States, the hearing afforded to him under the immigration laws and regulations is of a more formal nature.

A distinction between the rights of an alien found in the country and who is subject to deportation proceedings and the rights of an alien seeking admission to the country and who is the subject of exclusion proceedings was recognized in *United States et al. v. Woo Jan* (1918), 245 U. S. 552. The Supreme Court held that the rights of a person in the United States and the rights of one seeking to enter are identical in that in the first instance there should be a judicial determination of the rights of the alleged alien, and in the second instance the matter is subject to executive action.

White v. Chin Fong (1920), 253 U. S. 90;

United States v. Ju Toy, supra;

Pearson v. Williams (1906), 202 U. S. 281;

United States ex rel. Ciccerelli v. Curran, supra;

Ex parte Wong Yee Toon (D. C. Maryland, 1915), 227 Fed. 247, 251.

The executive branch of the Government, charged with enforcement of the immigration laws and authorized by act of the Congress to promulgate rules to assist in such enforcement, also has distinguished between the rights of an alleged alien who seeks to enter the country and the rights of an alleged alien who is found within its confines.

When one seeks to enter the United States, he is given a preliminary examination by an immigration inspector. If his right to enter the country is not clear, he then is accorded a hearing before a Board of Special Inquiry. The hearings before such boards are governed by Rule 12 of the Immigration Rules and Regulations of January 1, 1930, as amended. Section 17 of the Act of February 5, 1917, *supra,* provides that "all hearings before such boards shall be separate and apart from the public, but the immigrant may have one friend or relative present under such regulations as may be prescribed by the Secretary of Labor." When one is found within the borders of this country and is sought to be deported as an alien without right to remain, a warrant of arrest is issued by the Secretary of Labor and the alleged alien is given a hearing pursuant to Rule 19 of the Immigration Rules and Regulations of January 1, 1930, as amended. Under Rule 19, it is mandatory that, at the hearing held before the authority named in the warrant of arrest, the warrant shall be submitted to the alien for his inspection and he shall be informed of his right to be represented by counsel. If the alleged alien desires the assistance of counsel, such counsel then is permitted to be present during the hearing and to safeguard the legal rights of his client. In promulgating the two rules under which the procedure is so diverse, the executive officers charged with enforcement of the immigration laws have defined a fixed policy. They

have buttressed the provisions of Rule 12 that the alleged alien may have a friend or relative present by stipulating that such friend or relative is not and will not be employed by the alien as his attorney. Under Rule 19, the alleged alien found in the United States and subject to deportation proceedings is permitted the privilege of counsel on the hearing. Under Rule 12, counsel is prohibited. The reason for the difference in procedure is clear.

If an alleged alien has been domiciled in the United States or a resident therein for many years, having an established business, home and family, and an immigration official seeks his deportation on any ground prescribed by law, safeguards should be provided to protect the rights of such alien, especially if he claims citizenship. In such instances, no immediate hearing is necessary, and such hearing should be *quasi*-judicial in nature. However, when an alleged alien seeks admission to this country, the hearing concerning his right to admission, of necessity, must be summary in character. Under normal circumstances, a great number of applicants present themselves daily for admission to the United States. If they are not entitled to admission, the law requires the transportation company which brought them here to carry them back to the point of embarkation. They have no inalienable right to enter the United States. Permission to enter this country is a matter of grace. No complaint should be entertained if such applicants are afforded a reasonable opportunity before an unbiased board of disinterested officials to establish a right to admission within the purview of the law. Pursuant to the authority found in the Act of February 5, 1917 (8 U. S. C. A. 153), to prescribe rules and conditions under which a friend or

relative may be present at a hearing before a board of special inquiry in an exclusion proceeding, the Department of Labor has seen fit, on account of the exigencies and necessities of expeditiously handling the usual influx of immigrants, to provide that the action of immigration officials in these exclusion proceedings should be unhampered by rules of court procedure and technical and casuistic contentions of lawyers. Referring to the function of a board of special inquiry in an immigration case, Justice McKenna, speaking for the Supreme Court in *Tulsidas v. Insular Collector of Customs* (1923), 262 U. S. 258, said (p. 263):

> "It would seem, therefore, as if something more is necessary to justify review than the basis of a dispute. The law is in administration of a policy which, while it confers a privilege, is concerned to preserve it from abuse and, therefore, has appointed officers to determine the conditions of it, and speedily determine them, and on practical considerations, not to subject them to litigatious controversies, and disputable, if not finical, distinctions."

However, if the alleged alien is dissatisfied with a ruling of a board of special inquiry in an exclusion proceeding, or if any member of the board itself concludes that justice has not been meted out, there is provision for an appeal. If the case is plain and the facts are indisputable, the board of special inquiry is capable of deciding whether the alien is entitled to enter this country. Where the matter is complicated, an appeal may be taken and then the alleged alien may procure the assistance of counsel who has the right to examine the record and to prepare and conduct such appeal.

There is no doubt that the Department, acting under the provisions of the immigration laws, has authority to establish rules of procedure. The question is whether the established rule is reasonable or unreasonable. It must be reiterated that the alleged alien has no inalienable rights in the premises and that all that is accorded him is by way of grace. Even if he were a citizen of the United States, it would not be his constitutional right to be heard by counsel before an administrative tribunal. The Sixth Amendment to the Constitution guarantees the right of assistance of counsel only in criminal prosecutions. No act of the Congress conferring a legal right to representation by counsel is to be found in the statute books. In *Anderson v. Treat* (1898), 172 U. S. 24, the right to personal counsel, even in a criminal case, was restricted. Anderson, who was under sentence of death, sought relief in habeas corpus proceedings on the ground that he had been assigned counsel by the court on his trial and that later he had employed other counsel who was denied permission to see the petitioner for consultation. Relief was denied by the Supreme Court. It has been pointed out that on a hearing before a board of special inquiry in an exclusion proceeding, the rules of the Immigration and Naturalization Service specifically prohibit the appearance of counsel. The question then arises: Where does the right to counsel claimed by the petitioner in this case, Wong Choon Ock, spring from?

The law reports contain many cases bearing upon the construction and operation of Rule 19, *supra*, which is applicable only to deportation proceedings. Such authorities hold that Rule 19 must be liberally construed and strictly adhered to. Any deportation proceedings will be rendered unfair if the warrant of arrest is not sub-

mitted to the lien for inspection and he is not accorded the right of counsel during the entire hearing before the Board of Special Inquiry. There are a number of cases dealing with Rule 12, *supra*, which is applicable only to exclusion proceedings. The immigration authorities and the courts have taken it as a premise that, because of the necessity for a speedy hearing before an administrative board, the departmental regulation prohibiting counsel at the hearing before a board of special inquiry in an exclusion proceeding is reasonable. The cases in direct point justify Rule 12 (formerly Rule 11), *supra*, and hold it to be reasonable. While the admission and deportation of Chinese persons is governed by a separate legislative enactment, the same distinction is made in the handling of Chinese immigrants who seek admission and Chinese aliens who are the subjects of deportation proceedings after a stay in this country as that which is found in the general immigration Act. Under the provision of the Chinese Exclusion Act (Act of May 5, 1892; 27 Stat. 25; 8 U. S. Code, section 284), the burden is on the Chinese person to establish citizenship. Clearly, this rule regarding the burden of establishing citizenship is one of evidence relating to the sufficiency thereof and does not bear on the fairness of the hearing or the reasonableness of the rule prohibiting counsel at the hearing before a board of special inquiry in an exclusion proceedings. When a Chinese person applies for admission to the United States, his right to enter this country is weighed at a summary hearing. If he is already within this country, he can be excluded only after a judicial hearing.

In the case of *In re Can Pon et al.* (C. C. A. 9, 1909), 168 Fed. 479, Justice Gilbert, speaking to this point, said (p. 483):

> "In approaching the question whether upon the record in this case the applicant for admission to the United States was denied such a hearing as the statute contemplates, we must find our guiding principles in the construction which the Supreme Court has placed upon the law in the Ju Toy case and the Chin Yow case. * * * In brief, it is the doctrine of these two decisions that an applicant for admission to the United States, detained upon the border thereof by the officials of the Department of Commerce and Labor, is not deprived of his liberty without due process of law if his rights are determined without a judicial trial, and that the decision of the officers is due process of law, with this limitation, that such officers must grant a hearing in good faith, something more than the semblance of a hearing, and must take the testimony pertinent to the questions involved of such witnesses as may be suggested by the applicant. *This does not mean, and the decisions cannot be construed as holding, that the applicant is entitled of right to be present in person or by counsel at the taking of the testimony, or to be informed of the nature thereof, while it is being taken.* In this respect we do not find that the investigation and proceedings before the officers at Sumas and at Seattle in the present case were conducted in such a manner as to deprive the applicant of due process of law. *Nor, in the light of the record, are we able to assent to the conclusion reached by the trial court that the officers who conducted the examinations acted in a partial or arbitrary manner, or abused the discretion reposed in them, or acted upon improper testimony, or*

failed to conduct the investigation according to law and the rules of the department, or that the applicant was denied a fair opportunity to produce his testimony." (Emphasis ours.)

United States ex rel. Buccino et al. v. Williams, Com'r. of Immigration (C. C., S. D. N. Y., 1911), 190 Fed. 897, is directly in point. A writ of habeas corpus was sued out by the relators, who were Italian aliens seeking to enter the United States and who were held by the immigration authorities for return to the country from whence they came. The board of special inquiry, with three inspectors sitting, held that they were liable to become public charges and ordered their deportation. An appeal was taken to the Secretary of Commerce and Labor, who affirmed the decision of the board of special inquiry. Subsequently, for some reason not apparent, a rehearing was ordered before three inspectors other than those who had composed the first board of special inquiry. They called the aliens before them, heard testimony, and reached the same decision as the first board had reached. This latter finding was transmitted to the Secretary of Commerce and Labor who approved it. It was urged that the hearing before the board of special inquiry was unfair because the aliens had been denied the privilege and right to appear by counsel. Bearing upon this contention, Circuit Judge Lacombe said (p. 899):

"No authority is cited which sustains the proposition that upon the examination of an alien arriving in this country by the board of inspectors he is entitled to be presented by counsel. In Ex parte Loung June (D. C.), 160 Fed. 251, and in Re Tang Tung (D. C.), 161 Fed. 618, the relators were contending that they were native born citizens. In Glaves v. Williams,

> 190 Fed. 686 (C. C. S. D. of N. Y., Feb. 3, 1911), the question was not passed upon. In Boxny v. Williams, 185 Fed. 598, an attempt was being made to deport aliens who had been permitted to enter and had lived here for years. There is nothing in the statute which calls for the presence of counsel at the examination of aliens preliminary to admission; nothing to indicate that it was the intent of Congress that these investigations in hundreds of thousands of cases touching the qualifications of an alien seeking to enter were to be conducted as trials in court, with counsel present to represent the alien, witnesses called to testify, and elaborate examination and cross-examination of them. On the contrary, Congress relegated this question to administrative boards who might act summarily and expeditiously, and, to provide against an abuse of their discretion, accorded to the alien a right to appeal to the Secretary of Commerce and Labor. Nor do the rules provide for the presence of counsel at such examinations."

The court appears to distinguish *Ex parte Loung June, supra*, and *Re. Tang Tung, supra,* from the case before it on the ground that, in those cases, United States citizenship was asserted by the relators. However, reference to *Ex parte Loung June, supra,* shows that the question before the court was whether an order of a United States Commissioner was *res judicata.* The statements in the court's opinion regarding the presence of counsel referred to the prior hearing before the United States Commissioner and not to a hearing before a board of special inquiry. Moreover, the decision was reversed on appeal. *Cf.* 171 Fed. 413. The case of *Re. Tang Tung, supra,* may be disposed of by referring to the decision of the

Supreme Court in 223 U. S. 673. Neither of those cases held that an applicant for admission who asserted citizenship was more entitled to counsel at a hearing before a board of special inquiry than any other applicant seeking admission to this country or that either class of applicant to this country was entitled to counsel at a hearing before such board.

In *United States ex rel. Falco v. Williams, Immigration Com'r.* (C. C., S. D. N. Y., 1911), 191 Fed. 1001, a writ of habeas corpus was sued out by an alien immigrant, who was an Italian subject seeking admission to the United States. The board of special inquiry had excluded him as a person likely to become a public charge. A later hearing was held before another board of special inquiry, composed of different inspectors, which unanimously reached the same conclusion as the first board of special inquiry. An appeal was taken to the Secretary of Commerce and Labor, who affirmed the decision of the board of special inquiry and ordered the deportation of the alien. Among other things, the relator contended that he was not represented by counsel at the hearing before the Board of Special Inquiry. The court, speaking through Circuit Judge Lacombe, rejected this contention and stated (p. 1002):

> "A similar objection was disposed of in re Buccino, 190 Fed. 897 (October, 1911)."

In the case of *United States ex rel. Ivanow, et al. v. Greenawalt, U. S. Immigration Com'r.* (D. C., E. D. Pa., 1914), 213 Fed. 901, the court, after holding that the Congress may define and regulate the admission of aliens into the United States and prescribe the conditions upon which the privilege of admission may be enjoyed and that

the Congress may commit to any official, department or tribunal, executive or judicial, the determination of any questions of fact or otherwise upon which the admission of aliens may depend and may prescribe within what time, in what manner, and by whom any decisions made may be reviewed, stated (p. 905):

> "A further point is made of the partial exclusion of counsel from the hearings held by the immigration authorities. It is due both to the government officials and to counsel to have the fact appear of record that this exclusion, so far as it was enforced, was not personal to counsel nor peculiar to this case. There was no exclusion except to the extent that the general regulations of the department require. It is sufficient to say that in this there was no deprivation of any legal right. There is no act of Congress conferring the legal right of representation, and the constitutional right is given only in criminal prosecutions. Anyone familiar with the history of our race knows what a struggle was made to secure this right even in criminal cases, and, whatever views he may entertain as to the abstract justice of its denial in other proceedings, he would scarcely claim that by this a judicial question was fairly raised."

In *United States ex rel. Albro v. Karnuth, Dist. Director of Immigration* (D. C., W. D. N. Y., 1927), 31 Fed. (2d) 785, affirmed 279 U. S. 231, Rule 11 of the Immigration Rules of March 1, 1927, denying the right of counsel before a Board of Special Inquiry to an alien applying for admission, was held not invalid as denying due process of law to such alien. The court held that, while such rule was not expressly authorized by statute, it is within the general powers conferred on the administra-

tive department. Addressing itself to the right of aliens to be represented by counsel at hearings before a board of special inquiry in an exclusion proceeding, the court said (pp. 787-788):

> "Since many aliens, not of Canadian birth or citizenship, arrive daily from Canada, who labor in this country, especially in the border cities, and who likewise have been refused counsel at hearings, under rule 11, the question of the right to exclude counsel will be considered. Rule 11 of the Immigration Rules of March 1, 1927, reads as follows:
>
> " 'Hearings before the boards shall be separate and apart from the public; but the aliens may have one friend or relative present after the preliminary part of the hearing has been completed, provided—
>
> " '1. That such friend or relative is not and will not be employed by him as counsel or attorney.'
>
> "This rule, or a similar rule, has several times been before the courts for construction in this circuit. In U. S. v. Williams (C. C.), 190 F. 897, for example, the aliens, on their examination preliminary to admission, were refused counsel, and Judge Lacombe ruled that the statute did not authorize the presence of counsel at exclusion hearings; that, where aliens had entered and had resided here, they occupied a different status, but that Congress evidently did not intend that the qualifications of aliens intending to enter the United States should be tested by trials calling for the presence of counsel to represent them. * * *
>
> "See, also, U. S. ex rel. Falco v. Williams (C. C.), 191 F. 1001, U. S. ex rel. Chin Fook Wah v. Dunton (D. C.), 288 F. 959, and U. S. v. Greenewalt (D. C.), 213 F. 901. The relators did not ask to have

a friend or relative present as permitted by the regulation under which the hearing was conducted and, as the order or regulation expressly forbids the aid of counsel, there has been, in my opinion, no deprivation of any legal or constitutional right. The hearing was purely inquisitorial, without its having any relation to a criminal examination or investigation. The entry or admission of aliens into the United States, as said in the Greenawalt case, is a high privilege bestowed, and not a legal right, and Congress has unquestionably the power to delegate officials or nonjudicial tribunals to exercise functions of a judicial or administrative character for the purpose of insuring effective compliance with the immigration laws including the deportation of aliens who have unlawfully entered or their exclusion at the boundary. It is not within the province of this court to attempt to control or interfere with the determination of such officials or tribunals save only to protect aliens from the abuse of the discretion of administrative boards by way of habeas corpus.

"But it is strongly urged that the enforcement of rule 11 is nothing less than a denial of due process of law and that it is in conflict with rule 18 which permits the presence of counsel in deportation proceedings. I discover no conflict or inconsistency since a distinction with relation to proceedings against aliens domiciled in the United States and aliens stopped at the border for summary examination as to their right to enter is believed to be a proper exercise of procedure (U. S. v. Williams, *supra*), and the power to make such an order or regulation was not beyond the power delegated by Congress to the Bureau of Immigration.

* * * * * * * * *

"Beyond this, however, the department, which is charged with the enforcement of the Immigration Act, has the right, and, indeed, it is its duty, to prescribe orders, regulations, and rules, not only with relation to the details of procedure, but any fair and reasonable rule or method which will enable effective enforcement of the statute. If the prescribed regulation is not in conflict with the Immigration Act, it certainly falls within the scope of official duty to establish it, even though it is not specifically indicated as to the details. U. S. v. Grimaud, 220 U. S. 506, 31 S. Ct. 480, 55 L. Ed. 563; U. S. v. Birdsall, 233 U. S. 231, 34 S. Ct. 512, 58 L. Ed. 930. It seems to me plain that a rule or order to expedite inquiries of aliens, or hearings before a Special Board of Inquiry, at the border, to summarily ascertain the qualifications of aliens desiring to enter the United States, should not match judicial trials, or be conducted with similar procedural rules, and therefore the suggestion of deprivation of due process of law is not believed applicable, although due process of law, if a fair hearing is not accorded, may be tested on writ of habeas corpus."

Brownlow, U. S. Immigrant Inspector v. Miers (C. C. A. 5, 1928), 28 Fed. (2d) 653, involved precisely the same issue as the instant case is concerned with and decided such issue, at least for the United States Courts in the Fifth Circuit, in favor of the Government. Miers, an alleged infant alien, entered the United States as a stowaway on January 23, 1927. He was without credentials and was taken into custody by the immigration authorities. On May 19, 1927, a board of special inquiry accorded the alleged alien a hearing to determine his right to enter

the United States and ordered his exclusion. Miers appealed to the Secretary of Labor, who affirmed such decision. Subsequently, the alien filed a petition praying for a writ of habeas corpus, predicating his right to relief upon two propositions:

> (1) That his hearing before the board of special inquiry was unfair because he was denied the presence of a friend or relative as prescribed by the immigration law, because his written application to be heard by counsel before the board of special inquiry was denied, and because the board of special inquiry did not summon a witness whose testimony might have shed some light on the case; and
>
> (2) That the Government did not establish his alienage and did not show that he was not entitled to remain within the borders of this country.

After it had overruled a motion to strike the petition for writ of habeas corpus, the District Court adjudged that the hearing before the board of special inquiry had been unfair because Miers had not been permitted to have his attorney present at such hearing. The court declared the order of the board of special inquiry null and void and directed that Miers be held in the custody of the immigration authorities pending a hearing by a board of special inquiry in accordance with the immigration laws. The respondent immigration inspector, Brownlow, perfected an appeal in due course to the Circuit Court of Appeals, Fifth Circuit. The two questions presented on such appeal were:

> (1) Was Miers denied due process of law because he was not allowed the privilege of counsel when his right to enter the United States was heard before an administrative board?

(2) Was there an abuse of discretion by the administrative board in arriving at the decision that Miers was an alien and not authorized to enter this country in that there was no evidence adduced before such board that he was an alien?

The Circuit Court of Appeals, Fifth Circuit, reversing the judgment of the District Court in *Brownlow v. Miers,* held that the denial, under Rule 11 of the Immigration Rules of March 1, 1927, of the right of counsel before a board of special inquiry to an alien applying for admission did not render such hearing unfair or violate the due process of law requirements of the Constitution. In discussing this point, the court said (pp. 656-658):

"Congress, of course, has full and plenary power in dealing with the admission of aliens into this country, and might, if it saw fit, exclude them entirely. In the Act of February 5, 1917 (39 Stat. 874), it dealt at length with the matter and we think, recognizing the difficulties with which the immigation officers would be confronted, provided and intended to authorize different methods and procedure for handling cases, where the applicants were attempting to enter, from those of persons who had already entered and were sought to be deported, regardless of the manner of their getting into the country. In the first place, the law deals with two classes of aliens in separate sections. As to those seeking admission, it provides for expeditious and summary hearings, to the end that the thousands of immigrants coming be-

fore the department each year may be specially disposed of, with the idea, not only of permitting the machinery to function, but in the interest of the persons themselves, who must be held or put under heavy bail until their cases are decided, as well as the vessels, who have to bear the expense of returning aliens to their ports of departure, if excluded.

"In the concluding portions of section 16 of the Act of 1917 (8 U. S. C. A., Sec. 152) it is provided:

" 'Every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry. In the event of rejection by the board of special inquiry, in all cases where an appeal to the Secretary of Labor is permitted by this act, the alien shall be so informed *and shall have the right to be represented by counsel or other adviser on such appeal.* * * *'

"The procedure for handling cases of persons arriving and seeking admission is found in section 17 (8 USCA, Sec. 153), as follows:

" 'That boards of special inquiry shall be appointed by the commissioner of immigration or inspector in charge at the various ports of arrival as may be necessary for the prompt determination of all cases of immigrants detained at such ports under the provisions of the law. * * * Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported. All hearings before such boards shall be separate and apart from the public, but the immigrant may have

one friend or relative present under such regulations as may be prescribed by the Secretary of Labor. * * * the decisions of any two members of the board shall prevail, but either the alien or any dissenting member of the said board may appeal through the commissioner of immigration at the port of arrival and the Commissioner General of Immigration to the Secretary of Labor, and the taking of such appeal shall operate to stay any action in regard to the final disposal of any alien whose case is so appealed until the receipt by the commissioner of immigration at the port of arrival of such decision which shall be rendered solely upon the evidence adduced before the board of special inquiry. In every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of a board of special inquiry adverse to the admission of such alien shall be final, unless reversed on appeal to the Secretary of Labor. * * *'

"Section 23 (8 USCA, Secs. 102, 108) defines the power of the Commissioner General of Immigration as follows:

" 'That the Commissioner General of Immigration shall perform all his duties under the direction of the Secretary of Labor. Under such direction he shall have charge of the administration of all laws relating to the immigration of aliens into the United States, * * * shall establish such rules and regulations * * * and shall issue from time to time such instructions not inconsistent with law, as he shall deem best calculated for carrying out the provisions of this Act and for protecting the United States and aliens migrating thereto from fraud and loss. * * *'

"Section 19 (8 USCA, Sec. 155) applies to those who have already entered, but are sought to be deported. It reads:

" 'That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this Act, or in violation of any other law of the United States; * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported. * * * In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Secretary of Labor shall be final.'

"It will be noted that there is no attempt to provide in detail for the method of hearing the class of cases arising under the last quoted section of the Act. On the other hand, in those above quoted with respect to persons seeking admission, as before stated, Congress goes into very great detail and provides for prompt action. In doing this, it has itself indicated the instance in which the applicant shall have the right to counsel; *i. e.,* before the Secretary of Labor. See section 16 above cited. However, notwithstanding the minute detail of section 17 for a summary hearing, it not only does not give the right to counsel, but we think, in the light of the specific provision in section 16, coupled with the permission to 'have one friend or relative present,' reasonably excludes the idea that counsel should be permitted. The department has so construed it for years and accordingly has prescribed rules to govern at such hearings dis-

tinct from those on appeal to the Secretary of Labor, and in ordinary deportation cases. * * *

"In view of the specific provision for counsel on appeal in section 16 of the Act, we think the issue might be disposed of under the maxim *'Expressio unius est exclusio alterius.'* However, we pitch our conclusion upon the proposition that the hearing was not unfair because of the denial of counsel. One 'knocking at the door' does not enjoy the protection of the provision of the Fourteenth Amendment with regard to counsel, which in the first place applies only to a criminal case. The courts in such cases merely have jurisdiction to inquire and determine whether the proceedings before the administrative department of the government have been fair and not denied to the applicant any of the rights and privileges dictated by common justice. U. S. ex rel. Buccino *et al.* v. Williams, Commissioner of Immigration (C. C.), 190 F. 897; Quon Quon Poy v. Johnson, Commissioner, 273 U. S. 352, 47 S. Ct. 346, 71 L. Ed. 680." (Emphasis ours.)

In *United States ex rel. Chew Deck v. Commissioner of Immigration and Naturalization, Port of New York,* (D. C., S. D. N. Y., 1936), 17 Fed. Supp. 78, affirmed without opinion 86 Fed. (2d) 1020, certiorari denied 300 U. S. 666, a writ of habeas corpus was sued out by the relator who, alleging that he was the son of an American-born Chinese, claimed the right to enter the United States as the son of a native-born American citizen. In dismissing the writ, the court held that a person claiming the right to enter the United States as the son of a native-born American citizen is not entitled to a trial *de novo* by the court; that the immigration authorities, in passing

on the claimed right to enter the United States as a son of an American-born Chinese, are not bound by ordinary rules of evidence prevailing in court trials of common law actions; that the immigration authorities' use of discrepancies as a method of testing the value of testimony, where a Chinese person claims the right to enter the United States as the son of an American-born Chinese, is proper; and that the Labor Department is vested with power to make the rule, assailed by the petitioner, regarding the presence of counsel at a hearing before immigration authorities or the taking of testimony in the absence of such counsel.

The case of *United States v. Sing Tuck* (1894), 194 U. S. 161, 168, touches upon the pertinent principle of law. The Supreme Court, dealing with a Chinese person, used the following expression (pp. 168-169):

> "Considerations similar to those which we have suggested lead to a further conclusion. Whatever may be the ultimate rights of a person seeking to enter the country and alleging that he is a citizen, it is within the power of Congress to provide at least for a preliminary investigation by an inspector, and for a detention of the person until he has established his citizenship in some reasonable way. If the person satisfies the inspector, he is allowed to enter the country without further trial."

Under the Chinese Exclusion Act, a preliminary examination was made by an inspector whose actions were subject to approval of a board of review, with ultimate right of appeal to the Department. In the case at bar, a preliminary inspection is made by an inspector who, if he is not convinced of the applicant's right to enter the United

States, must refer the case to a board of special inquiry for further consideration.

In *United States v. Sing Tuck, supra,* the majority opinion of the Supreme Court found Rule 6 of the Immigration Rules to be reasonable. That rule provided:

> "Immediately upon the arrival of Chinese persons at any port mentioned in Rule 4 it shall be the duty of the officer in charge of the administration of the Chinese exclusion laws to adopt suitable means to prevent communication with them by any persons other than officials under his control, to have said Chinese persons examined promptly, as by law provided, touching their right to admission and to permit those proving such right to land."

Under the provisions of Rule 6, it will be seen that the applicant for admission is held incommunicado. The Supreme Court also held Rule 7 of the Immigration Rules to be a reasonable regulation. Under the terms of that rule, if a Chinese applicant was adjudged to be inadmissible after a hearing separate and apart from the public and in the present of Government officials and only designated witnesses, he shall be advised of his right to appeal and then his counsel shall be permitted to examine but not to make copies of the evidence. The Supreme Court, in approving these rules, said (p. 170):

> "The whole scheme is intended to give as fair a chance to prove a right to enter the country as the necessarily summary character of the proceedings will permit."

The case of *Quon Quon Poy v. Johnson, Commissioner* (1927), 273 U. S. 352, held that an applicant for admission to the United States has no constitutional right to a judicial hearing of his claim that he was born in and is a citizen of the United States. In that case, a Chinese boy, about 15 years of age, applied for admission to the United States and based his right to such admission on the claim that he was a foreign-born son of a native-born American citizen. Following the preliminary investigation by an immigration official, his claim was heard by a board of special inquiry, acting under the provisions of the Immigration Act of 1917. The board of special inquiry ordered the applicant's exclusion. This order was affirmed on appeal to the Secretary of Labor, after the finding of the board of special inquiry had been approved by the board of review. Habeas corpus proceedings were instituted and, on hearing, the writ was discharged and the petitioner was remanded to the custody of the Commissioner of Immigration. Under the provisions of section 238 of the Judicial Code, a direct appeal was taken to the Supreme Court of the United States. It was maintained that the Chinese boy had been denied a fair hearing and that the proceedings were irregular because no friend or relative of the applicant was present at the hearing, in accordance with the provisions of section 17 of the Act of February 5, 1917. However, the record showed that the petitioner, after being informed of his right to have a relative or friend present at such hearing, waived the privilege.

In *Quon Quon Poy v. Johnson, supra,* no contention was made that the hearing before the board of special inquiry was unfair or irregular because of the absence of counsel on behalf of the applicant. It appears from the opinion in the case that counsel for the petitioner was not present at such hearing. The following statement is found in the opinion of the Supreme Court (pp. 355-356):

> "At the commencement of the hearing before the Board the petitioner was informed of his right to have a relative or friend present, and stated that he did not desire to avail himself of this right and was willing to proceed with the hearing. He was also informed that the previous testimony given by himself and his alleged father and brother would be made a part of the proceedings before the Board; to which he made no objection. The petitioner was then further examined by the Board. After a postponement for the purpose of obtaining a report as to the physical condition of the petitioner, the Board resumed its hearing, the petitioner being again present; and after consideration of the entire testimony, being of the opinion that his relationship to Quon Mee Sing had not been reasonably established, voted to accord him five days in which to submit additional evidence. *Notice of this was sent to the attorney representing the petitioner—who had not been present at any of the proceedings—and he replied that the petitioner had no further testimony to offer.*" (Emphasis ours.)

It may be concluded that Quon Quon Poy's counsel recognized that the rule preventing his appearance before the board of special inquiry was a reasonable regulation, since he did not contend in the habeas corpus proceeding that the hearing was unfair because he had not been permitted to be present. The Supreme Court seemingly sanctioned such procedure since it held, after it noted the absence of counsel from the hearing before the board of special inquiry, that the proceedings conformed to due process of law. See:

Ex parte Chin Quock Wah (D. C., W. D., Wash., 1915), 224 Fed. 138;

Ex parte Chin Hing (D. C., W. D., Wash., 1915), 224 Fed. 261.

It may be pointed out that in *Nishimura Ekiu v. United States* (1892), 142 U. S. 651, the Supreme Court upheld the constitutionality of one of the older immigration acts and sanctioned rules and regulations which, if they are compared with the rule under attack in the instant case, would seem harsh and unjust. The court said (p. 660):

> "It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law."

Professor Thomas Reed Powell, in an article on the *"Conclusiveness of Administrative Determinations in the Federal Government,"* clearly stated the necessity for sumptuary rules and regulations and the reasons of public policy underlying them. He said:

> "The decisions of questions seriously affecting private rights must be committed to some fallible tribunal. Due process of law can rightfully demand no more than that the procedure devised for reaching the decision give to the individual every opportunity to establish his rights, consistent with maintaining the orderly and efficient administration of government. The public welfare is entitled to as much consideration as the private right; and the exigencies of national well-being have been rightfully deemed an important factor in determining whether the final decision of an administrative board is due process of law. The courts have regarded the cases, not as isolated examples of governmental activity, but as instances of many similar ones, and have in all cases been influenced by the effect a contrary rule would have on the work of the judiciary and the attainment of the end which the legislature and the court deemed essential to the public welfare.
>
> "But starting with the presence of a horde of immigrants on the frontier, whom the proper authority in the government has determined we must exclude, if our national ideals are to be preserved * * *, the demands of public necessity collide with the possible infringement of private right, and, rightly or wrongly, has been determined to be law in the United States that the exigencies of the national welfare are to have the right of way." (Political Science Review, August, 1907.)

Finally, it must be reiterated that the only cases bearing upon the right of an alien seeking admission to the United States to have counsel present at the time of hearing before a board of special inquiry hold that the denial of counsel at such time does not render the hearing unfair. This administrative practice has long been followed and has never been successfully challenged. This long-established practice of the Department should not be lightly overthrown:

United States v. Baruch (1912), 223 U. S. 191;

United States v. Healey (1895), 160 U. S. 136, 141, 145;

20 *Op. Atty. Gen.* 358, 362;

21 *Op. Atty. Gen.* 349, 352.

The regulations governing hearings before a board of special inquiry were promulgated by an executive department of the Government, to which the Congress has entrusted enforcement of the immigration laws. The judiciary should not interfere in the practical workings of these executive agencies unless it should appear, beyond a peradventure of a doubt, that these regulations constitute a denial of due process of law to the immigrants. This long-standing practice should bear great weight with the courts. Any doubt in this case should be resolved in favor of the administrative agencies:

Robertson v. Downing (1888), 127 U. S. 607;

U. S. v. Cerecedo Hermanos y Compania (1908), 209 U. S. 337.

The rights of thousands of applicants for admission to the United States have been determined under these regulations. The ruling of the District Court in the case at bar would seem to be in error, and its enforcement would seriously impair the administrative machinery for the enforcement of the immigration laws.

Conclusion.

It having been determined affirmatively that the executive officers have acted in a lawful and proper way in arriving at their decision: that they did not abuse the discretion lodged with them; that there was no erroneous application of the law, and the order of exclusion was not arbitrarily issued, the appellant respectfully contends that the court below erred in granting the Writ of Habeas Corpus and ordering the appellee discharged from the custody of the Immigration and Naturalization Service.

It is therefore respectfully requested that the order of the court below in discharging the appellee be REVERSED with direction to remand the appellee to the custody of the Immigration authorities.

Respectfully submitted,

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United States Attorney,

By RUSSELL K. LAMBEAU,
Assistant United States Attorney,

Attorneys for Appellant.

No. 9685

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM A. CARMICHAEL, District Director of the United States Immigration and Naturalization Service, Los Angeles, California District No. 20,

Appellant,

vs.

WONG CHOON OCK,

Appellee.

APPELLEE'S REPLY BRIEF.

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Parker & Baird Company, Law Printers, Los Angeles.

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No. 9685

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APPELLEE'S REPLY BRIEF.

Opening Statement.

The "Opening Statement" appearing on pages 1 and 2 of appellant's opening brief is substantially correct. The "Facts of the Case" on page 3 of the same brief is a correct statement so far as it goes. However, there are a great many additional facts which appear in the record and which will hereafter be called to the attention of the court in order that the grounds for the decision of the District Court may be thoroughly understood and appreciated.

Question at Issue.

Appellant states at page 4 of his opening brief that while there are five assignments of error, there is but one issue before this Honorable Court, to-wit:

> "Was the applicant accorded a fair hearing? Or specifically: Did denial of the representation by counsel at the Immigration hearing render the hearing unfair?"

The determination of appellant to limit the scope of this review to that single question is further borne out by the fact that commencing at page 12 of appellant's opening brief and continuing through to the conclusion, the brief is devoted entirely to the single proposition that a Chinese alien seeking admission to the United States is not entitled to be represented by counsel at his hearing before the Immigration Department. We do not concede the correctness of this proposition, but we will not devote space in this brief to lengthy reply for the reason that we deem the issue so presented to be in no sense determinative of this appeal.

The Memorandum Decision of the District Court [R. 9] partially quoted in appellant's brief at page 4, is set out at length herein (with numbers added in italics for the sake of clarity):

"(Title of District Court and Cause.)

MEMORANDUM OF DECISION.

Cosgrave, District Judge.

"In this matter the Board of Review on Appeal of the Immigration Department in Washington, *(1)* being dissatisfied with the sufficiency of the evidence supporting the findings of the Special Board of Inquiry, sent the case back with instructions to take further expert testimony. *(2)* Pursuant to such order Dr. Earl C. Kading was called. *(3)* No notice whatever was given to the applicant of the production of Dr. Kading as a witness and *(4)* no opportunity afforded for cross-examination of this expert on behalf of the applicant, *(5)* nor was applicant given any opportunity to produce witnesses to controvert the testimony of Dr. Kading.

"*(6)* Such proceeding is manifestly unfair, particularly since *(7)* in reaching its decision the Immigration Department has disregarded the competent and uncontradicted testimony of eye-witnesses as to the date of nativity and parentage of applicant.

"The petition for writ of habeas corpus is granted, and the petitioner is discharged from the custody of the Immigration authorities.

"July 1, 1940.

"(Endorsed): Filed Jul. 1, 1940."

From the foregoing it appears that there are no less than seven reasons why the District Court reached the decision it did, notwithstanding the statement on page 4 of appellant's opening brief that "the court regarded the hearing in this case to be unfair *solely* because the applicant was not permitted to be represented by counsel before the Board of Special Inquiry." (Italics ours.)

It is apparent that nowhere in the decision of the District Court is any emphasis placed on the fact that appellee was not permitted to be represented by counsel. The only part of the decision which even suggests this idea is number 4 which states: "No opportunity (was) afforded for cross-examination of this expert on behalf of applicant." This is a very different thing from saying that applicant was not permitted to be represented by counsel. It will also be noted that denial of counsel to applicant is not alleged as a ground of unfairness in the Petition for Writ of Habeas Corpus. [R. 1.]

Rule 12 of the Immigration Rules quoted at page 13 of appellant's opening brief permits the applicant to have one friend or relative present after the preliminary part of the hearing has been completed. If we concede that the applicant (a nine year old boy) might not have been qualified to cross-examine an expert witness like Dr. Kading, it is nevertheless quite possible that his friend or relative could have conducted such an examination. For example, it appears in the record [Tr. pp. 17 and 18] that applicant's father, Wong Quan, is not only an American citizen (this fact is expressly conceded by appellant at page 5 of his opening brief) but also that Wong Quan was born in San Francisco, and has lived his entire life in the state of California, speaks English fluently and served for twenty years as cook in the United States Navy. It thus appears that appellee's own father might very well have cross-examined the expert had an opportunity been afforded and that the District Court's reference to a denial of the right of cross-examination is by no means the same thing as saying that he was denied the right to counsel.

ARGUMENT.

A Correct Decision Will Not Be Disturbed on Appeal Because the Court Below Gave a Wrong or Insufficient Reason Therefor.

Even if one or more of the seven reasons set out in the opinion of the District Court were in the judgment of this Honorable Court wrong or insufficient, that fact alone would not justify the reversal of this judgment.

The Supreme Court of the United States has recently stated this rule in *Helvering v. Gowran,* 302 U. S. 238, 245, 82 L. Ed. 224:

> "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason. Frey & Son v. Cudahy Packing Co., 256 U. S. 208, 65 L. ed. 892, 41 S. Ct. 451; United States v. American R. Exp. Co., 265 U. S. 425, 68 L. ed. 1087, 44 S. Ct. 560; United States v. Holt State Bank, 270 U. S. 49, 56, 70 L. ed. 465, 469, 46 S. Ct. 197; Langnes v. Green, 282 U. S. 531, 75 L. ed. 520, 51 S. Ct. 243; Stelos Co. v. Hosiery Motor-Mend Corp., 295 U. S. 237, 239, 79 L. ed. 1414, 1416, 55 S. Ct. 746; cf. United States v. Williams, 278 U. S. 255, 73 L. ed. 314, 49 S. Ct. 97."

This case was followed and cited in a recent decision of the Circuit Court of Appeals for the Tenth Circuit, *North American Acc. Ins. Co. v. Tebbs,* 107 Fed. (2d) 853, 856. The same rule was applied by the United States Supreme Court in a habeas corpus case where the court says: "The judgment will not be reversed because an insufficient reason may have been assigned for the dismissal of the petition." *Ex parte Royall,* 117 U. S. 241, 29 L. ed. 868. A similar rule was stated by this Honorable Court in *Commissioner v. Bryson,* 79 Fed. (2d) 397, 402.

The District Court Has Made Findings of Fact Which Are Amply Supported by the Evidence and Are Therefore Determinative of This Appeal.

The entire immigration record which has been filed in this court was likewise before the District Court at the time its proceedings were conducted. After considering all this evidence and being fully advised in the premises, the District Court made its order granting the petition for writ of habeas corpus and discharging applicant from custody [R. 10]. This is the order from which the present appeal is taken. In this order the District Court found that the allegations of the petition are true and that appellee was illegally restrained of his liberty and prevented from entering into the United States by the appellant herein. By reference to the Petition for Writ of Habeas Corpus [R. 1] it is seen that the District Court has found as a fact that Wong Choon Ock (appellee) is a citizen of the United States; that he was born in China and that he is the son of Wong Quan, whose United States citizenship is conceded by the Immigration Department. It is further found as a fact that when appellee applied for admission to the United States at San Pedro, California, on or about June 25, 1939; that competent witnesses testified to the fact of his birth and relationship to his father and mother and that there was no showing of any untruth in his testimony respecting his relationship and nativity, and other matters bearing directly on his claim of American citizenship. It is further found as a fact that the adverse ruling of the Immigration Department was based solely on the opinion evidence of certain doctors to the effect that the appearance and bone structure of appellee indicated that he was from one to three years older than

he and his parents testified, and that accordingly he could not be the natural son of the said parents. It is further found as a fact that the opinion evidence of these doctors upon which the decision of the Immigration Department was based was and is uncertain, indefinite and wholly insufficient to raise any conflict or to cause any discrepancy in the testimony as against the positive and direct testimony of eye-witnesses to the nativity of the appellee. It is further found as a fact that appellee was denied the right, by the Immigration Department, to present the testimony of three additional eye-witnesses as to his nativity and relationship to his father; said witnesses each being native born American citizens and older brothers of applicant and who were personally present at the time of his birth. It is further found that all of the foregoing acts on the part of the Immigration Department prevented applicant (appellee), from receiving a fair and impartial hearing of his application for admission to the United States.

Appellant has utterly failed to point out any respect in which the evidence fails to support these findings of the lower court.

With respect to the evidence offered in support of appellee at the immigration hearing, it appears from the record to have been of the very highest and most convincing character. Appellee, together with his father, mother and younger brother, all arrived on the same steamer, traveling as a family unit. They were bound for the

parent's home in Los Angeles, in which city the older brothers of appellee are established in business.

We can do no better with respect to this testimony than to quote from the official conclusions of the Board of Review of the Immigration Department sitting in Washington, and dated November 2, 1939 (Immigration Record 56007/819):

> "Wong Quan, the alleged father of the applicant, Chin Shee, his alleged mother, and Wong Choon Loy, an alleged brother of the applicant, all three of whom accompanied the applicant on his journey to the United States, have testified as witnesses in support of his claim.
>
> *"The testimony is completely harmonious, no discrepancy of any sort being alleged.* Moreover, while the Board of Special Inquiry at San Pedro appears not to have observed a resemblance between the applicant and his alleged parents, *a comparison of the photographs indicates a marked similarity between the applicant and his parents in the matter of a rather peculiar ear formation which might be regarded as a family characteristic or peculiarity."* (Italics ours.)

Seldom indeed is it, that the Board of Review of the Immigration Department uses such language as quoted above: "The testimony is completely harmonious, no discrepancy of any sort being alleged."

The convincing character of this testimony impressed not only the Board of Review, but also the District Court as will be noted from its Memorandum Opinion, *supra.*

When it was learned for the first time that appellee's age had been challenged, application was promptly made for leave to reopen the case and submit additional evidence to the Immigration Department specifically on the question of appellee's age. The letter of Warner H. Parker, attorney for applicant, dated December 1, 1939, addressed to the Commissioner of Immigration is part of record No. 56007/819. The proferred testimony was competent and bore specifically on the question at issue; however, the application was denied by the Immigration Department as shown by the letter dated December 12, 1939, from Edw. J. Shaughnessy, Deputy Commissioner to Warner H. Parker, in the same record. At about this same time the case was reopened by the Immigration Department on its own motion to receive the testimony of its own medical expert, Dr. Kading. This is the expert who is referred to in the Memorandum Opinion of the District Court and the unfairness of this "star-chamber" proceeding was one of the things that impressed the lower court unfavorably [R. 9].

In *Chin Quong Mew v. Tillinghast,* 30 Fed. (2d) 684, the Circuit Court of Appeals for the 1st Circuit says:

> "The applicant was not informed by the Board that such evidence would be received and considered and was given no opportunity to refute or explain it. It was undoubtedly used and given weight by the Board in reaching its conclusion. *Such conduct was highly prejudicial and rendered its decision unfair.*" (Italics ours.)

The Lower Court's Finding That the Medical Testimony Was Uncertain and Inconclusive Is Amply Supported by the Evidence.

It has already been pointed out that the lower court found as a fact that the opinion evidence of the doctors as to appellee's age was and is uncertain, indefinite and wholly insufficient to raise any conflict or to cause any discrepancy in the testimony as against the positive and direct testimony of eye-witnesses to the nativity of appellee.

Appellant in an attempt to discredit the age claim of applicant calls attention to a photograph in the record and at page 6 of his opening brief makes the statement: "* * * the photographs show the applicant to be *practically twice as tall as his alleged brother.*" (Italics ours.)

This same assertion was made by appellant in his argument to the District Court. The manifest error of the statement was pointed out to the court below and we in turn request this Honorable Court to examine the photographs in the record. By actual measurement of the photograph, Exhibit "E", the younger boy, Wong Choon Loy is eighty per cent (80%) as tall as applicant. (Not fifty per cent (50%) as appellant's brief indicates.) In fact, the difference in height, as indicated in the pictures is what would be expected remembering that applicant is a tall thin child while his younger brother is of a short robust build. It is this very circumstance (that appellee is tall for his age), which no doubt led the doctors to their erroneous conclusions.

The doctors were all at variance respecting their opinions as to appellee's age. Dr. Campbell's testimony at page 32 of the transcript is in part as follows:

> "269 Q. Have you any opinion you care to express regarding Dr. Graning's report? A. Dr. Graning expressed the opinion that the boy is between the age of eleven and thirteen and I disagree with him and say that *the true age is as the boy stated it thru the interpreter, ten years.*" (Italics ours.)

Applicant's mother, Chin King Nue, also testified [Tr. p. 5] that applicant was "age ten". It is obvious, of course, that both applicant and his mother were using the Chinese mode of reckoning, by which a baby is one year old at the moment of birth, and not the American method by which a child is said to be of a given age throughout the year following the completion of the number of years stated as his age. The testimony therefore indicates an age of nine years for the applicant.

Inasmuch as applicant's father and mother left San Francisco for China on July 17, 1929 [Immig. Rec. p. 17], and arrived in that country early in August of that year. appellee might have been as old as nine years and ten months at the time of his first examination by the doctors.

The flimsy character of this opinion evidence to overcome the positive and direct testimony of eye-witnesses was recognized by the Board of Review of the Immigration Department in its Memorandum Decision dated February 17, 1940, which reads in part as follows:

> "The private physician employed by those interested in the applicant's cause to furnish additional evidence appeared before the Board of Special Inquiry and stated that in his opinion the applicant was

approximately ten years old at the time of his examination. According to his asserted birth date, the applicant was at that time two or three months under nine years of age. In the circumstances of the case the alleged father's paternity would be possible if the applicant were a few months over nine years of age. It was, therefore, felt that the discrepancy between the age which would accord with the applicant's asserted birth date and the age of the applicant as estimated by the medical examiners should not be regarded as sufficient to warrant the dismissal of the appeal without consultation with the appropriate official of the Public Health Service in the central office of that Service in Washington."

Dr. E. C. Kading's report (Immigration Record) of his examination made November 22, 1939 (five months after applicant's arrival), gives his height as 59¾ inches and weight 76½ pounds.

"Pediatric Dietetics" by N. Thomas Saxl, published in 1937, the leading authority on the development of children, contains a height and weight table on page 436 in which the minimum weight shown for a height of 59 inches is 87 pounds. The average weight for this height would be 89 pounds. This applicant's weight is therefore 13 pounds less than the average for a 59 inch height and 11 pounds less than the lowest weight given for this height in Saxl's table. Dr. Kading described applicant as "a boy of light bony frame". The photographs of applicant which are in evidence show him to be thin and flat chested and extremely tall in relation to his weight. The table above quoted shows applicant's weight to be about the average for nine year old boys, although his height is well above the average. Like many other little

boys he has the misfortune of being too tall for his age and weight.

In addition to the external appearance of the applicant the doctors have considered X-ray pictures of some of his joints, this involves the science of Roentgenology and is based on the assumption that X-ray pictures will disclose the "bone age" or "skeletal age" of an individual and that his true chronological age can be deduced therefrom. So far as we have been able to find this type of evidence was most recently considered by a Court of Record in the following case. District Judge Brewster, sitting in the District Court for the District of Massachusetts, had for consideration a petition for a writ of habeas corpus where a Chinese applicant who was a foreign born son of a citizen had been denied admission by the Immigration Department. In this case, *Chin Ten Teung v. Ward,* 30 Fed. Supp. 670, the court says:

> "This son of a citizen is denied admission because a medical examiner, who examined him and X-ray pictures, testified that he was 20 to 21 years of age. The medical examiner was obliged to admit that he was not qualified to say whether his theories respecting skeletal development would hold in the case of one of the Chinese race. There was medical evidence before the Board to the effect that age could not be accurately determined by the degree of ossification. A doctor testified that 'The reason why I have this conclusion is due to the fact that every author that has done research work on the epiphyses will not state definitely that the epiphyses united at the definite time due to the fact that these epiphyses are affected by sunlight, fresh air, muscular exercise, diet, and

glandular disturbance; * * * They are not definite in their opinion and I think I can't truthfully say the exact age and there is no one who can say the exact age of any individual within three years. * * *'

"The Board of Review had before it abundant evidence to the same effect from reputable sources, and also further evidence that the Chinese are of a very different type from the Caucasian, and that among the Chinese there is great variation in the time of junction of the epiphyses with the main part of the various bones to which they belong.

"Over against the unsupported hypothesis of the medical examiner can be set the testimony of relatives who had entered the country in 1923, all of whom agreed that the father Chin Yoke Sing had, at that time, only one son. * * *

"At the risk of coming perilously close to the limits which define the jurisdiction of the Court to overrule administrative action, I feel that this is a case where the action of the administrative authorities, both here and in Washington, in wholly disregarding important and reliable evidence, amounted to an unfair hearing; moreover, I think it may very well be held that the conclusion that the claimant was born prior to August, 1923, was without substantial evidence to support it.

"I cannot escape the conviction that, if a son of a citizen is to be denied admission to the United States, his exclusion should rest upon more substantial grounds than are shown in the records of this case.

"For these reasons, I order the writ of habeas corpus to issue and that the petitioner be discharged thereon."

Judge Brewster's decision finds ample foundations in the decisions of the U. S. Circuit Courts of Appeal for various circuits including this one.

In *Ward v. Flynn, ex rel., Yee Gim Lung,* 74 Fed. (2d) 145 (1st Cir.) Circuit Judge Morton states very clearly the powers of courts in habeas corpus with regard to the decisions of Immigration Officials. The court says:

> The law on this subject is familiar, and it is unnecessary to cite authorities. Tribunals which undertake to ascertain facts must proceed on evidence or on the personal knowledge of their members. They have no other way of getting at the truth. Of course, they are not obliged to accept every statement which is sworn to or to disregard inherent improbability; tribunals of administrative character may get at the facts in any way they see fit within the bounds of reason and fairness. Where the proceedings are of a sort in which deception and fabrication are often attempted, a suspicious attitude towards them is not unreasonable. *But, to reject sworn, consistent, unimpeached, and uncontradicted testimony, there must be a real reason which would be regarded as adequate by fair-minded persons.* (Italics ours.)

Applying this rule, Judge Brewster concluded in the *Chin Ten Teung* case, *supra,* that the conclusion of the doctors as to the applicant's age based on their examination of the applicant and upon X-ray pictures was not such a reason as "would be regarded as adequate by fair-minded persons" to cause the rejection of "sworn, consistent, unimpeached, and uncontradicted testimony". Similarly in the present case we believe that the opinions of

witnesses who have not the slightest knowledge of the fact of birth should not cause the rejection of the testimony of credible eye-witnesses to that fact.

The principal reliance in appellant's brief is placed upon the recent case of *Hom Ark v. United States*, 105 Fed. (2d) 607 (C. C. A. 9th). Respondent is mistaken when he states that this decision "determines and controls all the issues involved in the instant case" as will appear from the following analysis of the *Hom Ark* case:

1. In the Hom Ark case the question of age became an issue for a materially different reason from that in the instant case. Under Section 1993 of the Revised Statutes, applicant there was required to show that he was born after the date on which his father took residence in the United States; to-wit: February 8, 1921. This for the reason that Hom Ark's father was not a native born citizen of the United States and it was necessary to go back to Hom Ark's grandfather to find such a native born citizen. In the instant case not only is applicant's father, Wong Quan, admittedly an American citizen but he is also a native born citizen and thus the provision of law which barred Hom Ark would not apply to him. It is merely necessary in the instant case to establish that applicant is the son of Wong Quan. Inasmuch as Wong Quan's wife was with him in the United States and accompanied him to China on the 1929 trip, it is entirely possible that conception occurred well before they arrived or even before they departed from the United States. The foregoing distinction between the instant case and the Hom Ark case is important as showing that much greater latitude may be allowed with respect to the date of applicant's birth than was possible in the Hom Ark case.

2. An essential distinction between the two cases arises through the lack of competent testimony in the Hom Ark case as to the date of birth. At page 608 of the opinion, the court says:

> "On this subject, appellant offered no testimony except that of himself and his alleged father, Hom Chuie. They both testified that appellant was born on February 22, 1921. What their testimony was based on, is not apparent. *It obviously was not based on personal knowledge.* Appellant, of course, could not actually know the exact date of his own birth. On the claimed date, February 22, 1921, Hom Chuie was in the United States. Therefore, he could not know that appellant—admittedly born in China—was born on that date." (Italics ours.)

By way of contrast with this total lack of competent testimony as to appellant's age in the Hom Ark case, we have in the instant case such competent and convincing testimony by eye-witnesses that the Board of Review in their memo dated November 2, 1939, is constrained to say: "The testimony is completely harmonious, no discrepancy of any sort being alleged." It is easy to understand why, in the Hom Ark case with no evidence fixing the date of birth except the rankest hearsay, that this Honorable Court could say at page 610,

> "X-ray pictures are not, of course, infallible means of determining age. No one claims that they are."

and yet conclude that opinion evidence of this type should prevail in a case where there is no direct evidence to offset it. However, when, as in the instant case there is positive and uncontradicted eye-witnesses' testimony as to the date of birth, opinion testimony of the doctors respecting age does not furnish a real reason to reject consistent and unim-

peached testimony which would be regarded as adequate by fair minded persons.

3. The age issue in the Hom Ark case was between 17 and 20 years, and the instant case involves a much younger child. Quoting from the Hom Ark case on page 609 it is said:

> "Q. Dr. King has stated in his letter * * * that he * * * examined an individual whose wrist bones were ossified although the child was but five years of age. Would that same be true at the advanced age of between 17 and 20? A. I don't think that would be a parallel at all. *That is an entirely different age period.*" (Italics ours.)

Much of the testimony quoted in the *Hom Ark* case serves to emphasize and support appellee's contention made at some length earlier in this brief, that conclusions based on X-ray pictures are a most unreliable method of determining age. Quoting from the *Hom Ark* case on page 609 it is said:

> "* * *, the following letter addressed to appellant's attorney and signed by Dr. C. V. King, roentgenologist of Los Angeles, California was put in evidence:
>
> "I have today examined some X-ray films of the right wrist and right elbow, at your request, which were taken of (appellant) on May 11th, 1938, by Dr. Albert Allen of San Pedro, California. * * *
>
> "These films both show a stage of development which should be expected in a person about 20 or 21 years of age. However, it must be borne in mind that the bones of some individuals develop more than usual and epiphyseal lines may be obliterated at an age several years sooner than expected. Such devel-

opment is not very unusual and, indeed, I have examined today another individual in whom there was no question of the age chronologically and yet the bones of the wrist were well ossified to the point commonly seen in a child at *least 7 or 8 years of age, although this child was only five years of age.*

"Accordingly, I feel that the evidence of the true age of the individual is not always conclusive and a variance of 5 to 6 years might be allowed in a person past the age of adolescence." (Italics ours.)

The variability and uncertainty of the testimony of the kind found in the present case to establish age is further seen in the conclusions reached by the doctors themselves. Dr. F. McLain Campbell concluded that applicant "is around the age of 10 years".

Dr. Harold M. Graning gives as his opinion (Exhibit "D") that applicant "is between 11 and 13 years." Dr. E. C. Kading states "in my opinion he is between 13 and 15 years of age." We thus find an amazing variation in the opinions rendered by the doctors themselves. Only Dr. Campbell suggests a definite age and the other two allow themselves a three year leeway. The estimates of all three medical men combined involves the amazing discrepancy of five years or approximately 50% of the subject's age. When there is such a great inconsistency in the affirmative testimony of these doctors, their opinions of the negative subject (namely that applicant is not of the age he testified to) is equally incredible.

The science of Roentgenology, so far as it applies to the determination of the skeletal age of an individual is simply a matter of averages, and is recognized by medical authorities as subject to great variations. Dr. Isidore

Cohn in his work "Normal Bones and Joints" has this to say:

> "It is interesting to note that up to the present time there is a marked variation noted regarding the time of ossification of certain of the epiphyses. The period of complete ossification probably is different under different climatic conditions; this also will give an opportunity for a study of this subject in the colder climates. The literature on the subject is misleading, there is no agreement among authorities as to the period at which union occurs, or the exact number of epiphyses."

To arrive at the averages upon which the doctors in this case have based their conclusion statistics were gathered covering a great number of cases. After tabulating these findings the averages are said to be the normal skeletal ages. In "Osseous Index of Skeletal Development" by Flory it is pointed out that the skeletal age varies greatly from the true or chronological age especially in children of the ninth and tenth years. In commenting on this variation the author says:

> "Individual variations appear in skeletal development with the same sort of characteristics as have been observed for other types of physical growth. The majority of children progress toward maturity in a rather regular fashion with few fluctuations, little deviation from the mean, and no atypical symptoms. This large group of average or near average children need very little adjustment of social prac-

tices to meet their needs. Extreme deviates and widely fluctuating individuals present a more serious problem. Some children mature early, others mature late, and still others move from the accelerated group to the retarded group or from the retarded group to the accelerated group. Most individuals reach skeletal maturity at some age. *Each individual has his own growth rate.*" (Italics ours.)

Even the height and weight tables relied on by the doctors are subject to great uncertainties. In "Pediatric Dietetics", *supra,* at page 435, it is said:

> "With so many factors creating disparity and militating against agreement in absolute weights, it becomes evident that there can be no definite rule as to what a child should weigh at any period of life. Nevertheless, measurements of hundreds of thousands of juveniles have established the average child to be within certain height and weight limits at different ages. This has led to the construction of a table which designates approximate heights and weights at given ages."

We have already seen that the applicant is extremely tall for his weight, it follows that he is also tall for his age. Skeletal age and height are more closely correlated than any other two factors; that correlation in the case of boys being .88 (page 20 of Osseous Development, etc., *supra*). This shows that if boy is extraordinarily tall for his chronological age, he will have a skeletal development that will be correspondently advanced for his age. This is the factor which has led the doctors to an erroneous con-

clusion of the applicant's age as based on the X-ray pictures.

Reference is made to the Radiographic Report, which is Exhibit "E" in the files. It states that the pisiform (a small bone in the wrist) is present and that the average age for its appearance is 10 years. However, the appearance of this bone has been noted in children of seven years or younger and ten years is merely the average. The conclusions of these doctors, therefore, are entirely discredited when it is observed their opinions are based on the normal or average development in boys. Everything in this record indicates that the applicant is not a normal or average case.

The fallacy will be made more apparent by a homely illustration. Suppose a father took his son into a store and asked for a "nine year old" suit. The clerk after trying vainly to fit the lad into the requested size, finally found that a "twelve year old" suit gave a fairly good fit. The clerk thereupon turned to the father and declared: "You lied to me! This boy is not nine years old, he is really twelve years old, I can prove it because his body fits into a 'twelve year old' size suit."

This Honorable Court expressed its strong disapproval of medical testimony to establish age in the case of *Woo Hoo v. White,* 243 Fed. 541. Opinion by Circuit Judge Gilbert. The court says:

> "The doubt expressed by the Commissioner General as to the alleged age of the applicant was based

> upon a certificate of two surgeons that, after a careful consideration of the physical characteristics, they were of the opinion that 'his age is within one year either way of 23 years'. It is not represented that the certificate was based upon any scientific data, or otherwise than upon the general appearance of the applicant. Upon such a question the opinion of a surgeon is believed to be of no greater value than that of a layman, *and in either case it has but little probative value to show a difference of age of only two years.*" (Italics ours.)

The above case was cited with approval and followed by the District Court for the Northern District of California in *Ex Parte Gin Mun On,* 286 Fed. 752. In referring to the *Woo Hoo* case, *supra,* District Judge Dooling says:

> "When the court lays down as a fact that such opinion has but little probative value to show a difference of age of only two years, it seems to me that is the first thing that should be submitted to a board of inquiry, who have to pass upon the weight of such testimony in the first instance."

The decision goes on to hold the action of the Immigration Board in that case to be unfair.

In *Fong On v. Day,* 39 Fed. (2d) 202, the court rejected a medical certificate offered as evidence of the fact that applicant was not less than sixteen years old, whereas, he claimed to be only twelve years of age.

It Constitutes Unfairness for the Immigration Department to Reject Sworn, Consistent and Uncontradicted Testimony Without a Real Reason Which Would Be Regarded as Adequate by Fair-Minded Persons.

Almost all of the Circuit Court of Appeals decisions we have examined involve an appeal by the applicant after his petition for writ of habeas corpus was denied by the District Court. An exception is the case of *Ex parte Chung Thet Poy,* 13 Fed. (2d) 262; in this case the District Court granted the writ and discharged applicant from custody. The case is similar to the one at bar in that the relationship of applicant to his father was the sole point in question. The court says:

> "It is difficult to perceive how any tribunal could fairly consider the evidence adduced in support of the applicant's claim, without being satisfied as to the claimed relationship to the father, unless the board was arbitrarily seeking to discover some grounds, however immaterial or unsubstantial, upon which it could base an excluding decision.
>
> "I think this is a case which warrants the court in assuming jurisdiction on the ground that the applicant was denied that fair hearing to which he may justly lay claim. While the court is without power to weigh the evidence, for the purpose of revising decisions of the administrative officials, it is not, I take it, powerless to act if the court is of the opinion that the decision of the administrators was wholly without warrant. Chin Hoy v. U. S. (C. C. A.) 293 F. 750; Lew Shee v. Nagle (C. C. A.) 7 F. (2d) 367; Christy v. Leong Don (C. C. A.) 5 F.

(2d) 135. See, also Kwock Jan Fat v. White, 253 U. S. 454, 40 S. Ct. 566, 64 L. Ed. 1010; Ng Fung Ho v. White, 259 U. S. 276, 42 S. Ct. 492, 66 L. Ed. 938."

This decision was appealed by the Government and was later affirmed by the Circuit Court of Appeals for the First Circuit; *Johnson v. Chung Thet Poy,* 16 Fed. (2d) 1018. The Appellate Court says:

> "In the District Court it was found that the applicant was denied a fair hearing by the board; that it acted in an arbitrary manner in arriving at its excluding decision. We think the conclusion reached by the District Court was right and that the decree discharging the applicant should be affirmed."

In the instant case the Administrative Officers of the Immigration Department have rejected sworn, unimpeached and uncontradicted testimony without any reason which would be regarded as adequate by fair-minded persons. The courts have always held that when this condition exists the hearing accorded the applicant was unfair and he should be released on habeas corpus.

The general rule regarding finality of the decisions of the Immigration Department is subject to the exception that the hearing granted by the Department must be fair and that it constitutes unfairness for Administrative Officers to reject sworn, unimpeached and uncontradicted testimony without a reason which would be regarded as adequate by fair-minded persons.

In *Ward v. Flynn, ex rel., Yee Gim Lung,* 74 Fed. (2d) 145 (1st Cir.), Circuit Judge Morton states very clearly the powers of courts in habeas corpus with regard to the decisions of Immigration Officials. The court says:

> "The law on this subject is familiar, and it is unnecessary to cite authorities. Tribunals which undertake to ascertain facts must proceed on evidence or on the personal knowledge of their members. They have no other way of getting at the truth. Of course, they are not obliged to accept every statement which is sworn to or to disregard inherent improbability; tribunals of administrative character may get at the facts in any way they see fit within the bonds of reason and fairness. Where the proceedings are of a sort in which deception and fabrication are often attempted, a suspicious attitude towards them is not unreasonable. *But, to reject sworn, consistent, unimpeached, and uncontradicted testimony, there must be a real reason which would be regarded as adequate by fair-minded persons.*" (Italics ours.)

A similar conclusion is reached by the court *In re Cheung Tung,* 292 Fed. 997, where a writ of habeas corpus was granted and it is held that a hearing is unfair where the Immigration Officers totally reject the direct and positive testimony of the petitioner and other witnesses because of a minor variance in the testimony. The court says:

> "For the officers to require more conclusive evidence than the petitioner has furnished is to demand proof beyond all doubt and to a moral certainty, and such a requirement would constitute a fundamental error in the application of the law. *In re Wong Toy* (D. C.), 278 Fed. 562."

In *Jew Yut Chew v. Tillinghast,* 25 Fed. (2d) 886, it is held that minor discrepancies in testimony of Chinese applicant's alleged father and brother were not grounds to cause his exclusion.

The Circuit Court of Appeals, First Circuit, has said in *Flynn ex rel. Yee Suey v. Ward,* 104 Fed. (2d) 900, that

> "The exclusion of Chinese cannot be justified merely because there are trivial and slight discrepancies in his proof nor an unjustifiable and arbitrary deduction from the evidence be made the basis for an order for exclusion. *That sort of procedure would demonstrate that the hearing was unfair."* (Italics ours.)

The recent and well considered decision of this Honorable Court, *Chun Kock Quon v. Proctor,* 92 Fed. (2d) 326, is important. In this case the Appellate Court reversed the decision of the District Court for the Western District of Washington which had denied the petitioner a writ of habeas corpus. After pointing out that the burden of proving citizenship is on the applicant, the court says:

> "A finding of the immigration authorities to the effect that an applicant is not a citizen *must have some factual support in the record.* Kwock Jan Fat v. White, 253 U. S. 454, 458, 40 S. Ct. 566, 567, 64 L. Ed. 1010. (Italics ours.)

"The fundamental principles controlling the deliberations and determination of the immigration officials and the Secretary in an exclusion case are held, in an opinion of Mr. Justice Hughes, to be 'the fundamental principles of justice embraced within the conception of due process of law.' Tang Tun v. Edsell, 223 U. S. 673, 682, 32 S. Ct. 359, 363, 56 L. Ed. 606.

"In a subsequent exclusion case, in an opinion by Mr. Justice Clarke, the Supreme Court said: 'The acts of Congress give great power to the Secretary of Labor over Chinese immigrants and persons of Chinese descent. It is a power to be administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race. It is the province of the courts, in proceedings for review, within the limits amply defined in the cases cited, to prevent abuse of this extraordinary power. * * * *It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country.*' (Italics supplied by the Court.) Kwock Jan Fat v. White, 253 U. S. 454, 464, 40 S. Ct. 566, 569, 570, 64 L. Ed. 1010.

"This court has recently stated of the immigration officials in deportation cases: 'Their obligation as enforcers of the immigration laws is as mandatory

to establish citizenship, if it exist, as it is to deport the alien.' Lau Hu Yuen v. U. S. (C. C. A. 9) 85 F. (2d) 327, 331. * * *"

Conclusion.

Since the eye-witness testimony in favor of this applicant is of unimpeachable character and since there is ample support in the record for the finding of the District Court that the adverse medical testimony is uncertain and inconclusive, it follows that the decision of the lower court was correct and should be affirmed.

Respectfully submitted,

GEO. W. FENIMORE,
Attorney for Appellee.

No. 9685

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM A. CARMICHAEL, District Director of the United States Immigration and Naturalization Service, Los Angeles, California, District No. 20,

Appellant,

vs.

WONG CHOON OCK,

Appellee.

Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

APPELLANT'S PETITION FOR REHEARING.

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To the Honorable, the Judges of the Above-Entitled Court:

WILLIAM A. CARMICHAEL, District Director of the United States Immigration and Naturalization Service, Los Angeles, California, District No. 20, appellant in the above-entitled matter, respectfully requests the above-entitled Honorable Court that he be granted a rehearing in the above-entitled cause after adverse decision made and entered on April 19, 1941, affirming the action of the United States District Court for the Southern District of California, Central Division, dismissing writ of *habeas*

corpus, and as grounds for said rehearing the appellant respectfully sets forth the following:

That the decision of this court is in conflict with an earlier decision of this same court in the case of *Kong Din Quong v. Hoff, District Director of Immigration, etc.* (C. C. A. 9, 1940), 112 Fed. (2d) 96. In our opinion the effect of the instant decision is to substitute the judgment of the court for the decision of the Board of Special Inquiry on a question of disputed fact, which was arrived at after weighing conflicting evidence.

Respectfully submitted,

WM. FLEET PALMER,
United States Attorney,

RUSSELL K. LAMBEAU,
Asisstant U. S. Attorney,

Attorneys for Appellant.

I, counsel for the above named appellant, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

RUSSELL K. LAMBEAU.